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REPORTS

OF

CASES ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

THE UNITED STATES.

JANUARY TERM, 1843.

BY BENJAMIN C. HOWARD,

COUNSELLOR AT LAW, AND REPORTER OF THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

VOL. I.

CONTAINING, IN AN APPENDIX, A LIST OF ALL THE CASES DECIDED IN THAT COURT FROM THE EARLIEST REPORTS TO THE PRESENT TIME.

PHILADELPHIA:
T. & J. W. JOHNSON, LAW BOOKSELLERS.
1843.

NC

ENTERED according to act of Congress, in the year 1843, by T. & J. W. JOHNSON in the Clerk's Office of the District Court of the Eastern District of Pennsylvania.

REPRINTED
FROM THE ORIGINAL EDITION
BY
WILLIAM S. HEIN & CO, INC.
BUFFALO, N. Y.
AND
CLARK BOARDMAN CO., LTD.
NEW YORK, N. Y.
1968

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APPOINTMENT OF REPORTER.

In pursuance of the act of Congress approved August 26th, 1842, the court proceed to appoint a Reporter, and order that Benjamin C. Howard be and he is hereby appointed Reporter, in the Supreme Court of the United States.

January 27th, 1843.

Benjamin C. Howard, Esquire, being appointed Reporter of the decisions of the Supreme Court of the United States under the act of Congress of 26th of August, 1842, took in open court the following oath of office: "I do solemnly swear that I will faithfully and impartially discharge and perform all the duties of my said office, according to the best of my abilities and understanding, and that I will support the Constitution of the United States; so help me God:" and thereupon entered upon the discharge of his duties.

February 1st, 1843.

A CARD,

FROM THE REPORTER TO HIS PROFESSIONAL BRETHREN AND THE PUBLIC GENERALLY.

Some of the longest cases which were argued at the late term, having been ordered to be re-argued at the next, or held under a curia advisare vult, the size of the present volume would be reduced if it contained only the cases decided. The Reporter takes advantage of the favourable opportunity, to insert two articles which he believes will be acceptable to the profession. One is, a publication of the entire Rules of Court, Common Law and Chancery, the latter of which were adopted at January term 1842, subject to such revision as might be made at the late term. They are now published as having undergone that revision, and it will be a convenience to the Bar to have the whole rules together. The other article is a list of all the cases which have been decided by the Supreme Court since its origin, with a reference to the volume in which they are to be found.

The Reporter avails himself of this opportunity to tender his professional services, in arguing causes before the Supreme Court. Cases are often brought up from distant courts; and from the uncertainty of the time at which they may be called, as well as the small amount in controversy, it is inconvenient or impossible for the counsel who argued them below to follow them. The daily presence of the Reporter in court will ensure his attention to any cases that may be confided to him.

OBITUARY.

FRANCIS S. KEY.

January 12th, 1843.

The Attorney General, who was about to commence an argument in a cause before the Court, said, that before proceeding with the matter in hand, he would, at the suggestion of several of his brethren, state to their Honours, that very melancholy tidings had just reached this city, which might make it an appropriate tribute to departed worth, to suspend the business of the day for the rest of the day. He had just been informed that their distinguished Brother FRANCIS S. KEY, was no more. And therefore moved that this Court, in honour of the memory of the deceased, should stand adjourned till to-morrow.

Whereupon Mr. Justice Thompson replied:—The Court received this information with feelings of deep affliction, and, in compliance with the application of the Bar, will adjourn until to-morrow.

January 13th, 1843.

On the opening of the Court this morning, Mr. Legaré, the Attorney General of the United States, made the following remarks.

"May it please your Honours:

"A meeting of the members of the Bar and the officers of the Court, held since the adjournment yesterday, have been pleased to impose on me the melancholy task of communicating their proceedings to the Bench, and conveying to it, their sense of the loss which society and the profession have sustained, in the death of the late FRANCIS SCOTT KEY. I cannot but be deeply conscious of the disadvantages under which I labour, in acquitting myself in this presence of the duty that has been thus confided to me.

"My acquaintance with the excellent man whose sudden death, in the midst of a career of eminent usefulness, public and private, and of the most active devotion to the great interests of humanity, we are now called to deplore, was until a very recent period extremely limited. But short as was my personal intercourse with him, it was quite long enough to endear him to me, in a peculiar manner, as one of the most gentle, guileless, amiable, and attractive beings, with whom, in an experience sufficiently diversified, it has ever been my good fortune to act. Ardent, earnest, indefatigable in the pursuits of his objects, and the performance of his duties,—eloquent as the advocate of whatever cause he embraced, because his heart was true and his sympathy cordial and susceptible,—decided in his own conduct, without one particle of censoriousness or acerbity towards others,—with the blandest manners, the most affectionate temper, the most considerate toleration of dissent, the most patient acquiescence in the decisions of authority, even where he had most strenuously exerted himself to prevent them—his life seemed to me a beautiful pattern of all that is lovely, winning and effective, in the charity of a Christian gentleman. I say effective, for his was no 'fugitive and cloistered' virtue, which gave no offence because it shunned all contest, and maintained its purity only by avoiding the contaminations of the world. He lived, on the contrary, in the very midst of the passions, the struggles, and the warfare of active and even public life,—he was always in the heat and dust of the arena, armed and equipped for conflict,—he omitted no opportunity of doing good, which either chance or design afforded him; and his patriotism and his philanthropy vied with each other in turning to account every moment of his time which was not engrossed in the cares of his fireside or the business of his profession. I remember with melancholy pleasure that the very last conversation which I held with him, turned upon a project of what he believed to be the most extensive usefulness, which had warmed his heart with enthusiastic hopes for his country and for mankind.

"Of the manner in which he discharged his professional duties, your Honours are, on every account, the most competent wit-

nesses. You know his fidelity to his engagements—his punctuality in attendance at his post—how laborious he was in the preparation of his cases—how full of resources in the management of a cause—how ready, how fertile, how ingenious in the invention and discussion of his topics. Your Honours are therefore fully prepared to receive and confirm the testimony, which his brethren of the Bar have been eager to bear, to the virtues and abilities that adorned him, and which in compliance with their request I have now the honour of submitting to you."

At a meeting of the members of the Bar and officers of the Court, convened in the room of the Supreme Court, in the Capitol, on Thursday the 12th day of January 1843, the Honourable John McPherson Berrein, of the Senate of the United States, was appointed chairman, and Richard S. Coxe secretary.

General Walter Jones submitted the following preamble and resolutions, which were unanimously adopted.

This meeting has received with deep affliction, news of the death of FRANCIS S. KEY, the ornament of his profession and of human nature. His loss is felt by each individual of this meeting as that of a near, admired, and beloved friend. They feel that it is the general loss, the diffusive grief of the community, not any peculiar grief of attached and devoted friends. Himself the active and enlightened and self-sacrificing friend of man, by man was he beloved, by man is his death deplored. The fresh emotions caused by his sudden death leave no room for eulogy; his eulogy is deeply spoken in these emotions, and lives in every heart.

This meeting therefore confines itself to such demonstrations of respect to his memory as are more immediately demanded by the character of the deceased and the general regrets which his death has occasioned.

Therefore, Resolved, That we wear the usual badges of mourning for the space of thirty days.

That the Hon. R. J. Walker, the Hon. Charles J. Ingersoll, the Hon. Aaron Ward, the Hon. James J. Roosevelt, P. R Fendall, Esq., Jos. H. Bradley, Esq., Wm. Thos. Carroll, Esq., and Gen. Alexander Hunter, be appointed a committee to go to

Baltimore, and attend, on behalf of the meeting, the funeral of the deceased.

Resolved, That Mr. Legaré, the Attorney General of the United States, communicate these proceedings to the Supreme Court, and respectfully request in the name of this meeting, that they may be entered among its records.

Resolved, That the Chairman and Secretary also transmit a copy to the family of the deceased, and assure them of our sincere condolence on account of the great loss they have sustained."

To which Mr. Justice Thompson made the following reply:—

"The information communicated by the Bar, of the sudden and unexpected death of Mr. KEY, was received by the Court with feelings of most sincere regret.

"The suddenness of this afflictive event, is calculated to make a deep impression upon all. His intimate intercourse with the Bar, and his near connexion with one of the Court, bring this dispensation nearer home to us all, accompanied with the solemn admonition 'be ye also ready.' We feel very sincerely the loss which the Bench, as well as the Bar, has sustained in this event. We have been so long accustomed to see him at the bar, that his absence will leave a painful void. And the loss of the pleasure and instruction with which we have listened to his arguments will be most sensibly felt. Mr. Key's talents were of a very high order. His mind was well stored with legal learning, and his literary taste and attainments were highly distinguished; and added to these was a private character which holds out to the Bar a bright example for imitation. The loss of such a man cannot but be sincerely deplored.

"In compliance with the request of the Bar, their proceedings will be entered upon the minutes of the Court."

WASHINGTON, *March* 17, 1843.

DEAR SIR:

I promised Mr. Peters, the late reporter, some weeks past, to furnish him with a correction of the errors that had occurred in printing the opinions of the Supreme Court, (U. S.,) written by me. I have, with the aid of the clerk, compared the printed opinions in the 12th, 13th, 14th, 15th and 16th volumes of Peters' Reports with the original ones, in manuscript, and of file, and detected many errors; and as they cannot be corrected in Mr. Peters' reports until a second edition is published, and this may not occur for many years, my desire is, that you publish the *errata* in your first volume, so as to preserve my own corrections.

With sincere regard,

Your friend, and obedient servant,

J. CATRON.

To B. C. HOWARD, Esq.,
Reporter S. C. U. S.

List of Errata in the Opinions of the Court as pronounced by Mr. Justice Catron, or in his Dissentient Opinions, contained in the 12th, 13th, 14th, 15th and 16th volumes of Peters' Reports.

VOL. XII.

Page	50,	line	13, *for* ; *read* ,
"	51,	"	17, *for* -- *read* -
"	52,	"	13, *for* 8th of July, *read* 8th day of July.
"	"	"	17, *for* .. *read* .
"	"	"	18, 24, *for* one thousand dollars, *read* thousand dollars.
"	"	"	31, *for* one, *read* a.
"	54,	"	19, *for* amounts, *read* amount.

Page	55,	line	1, 10, *for* 2 Peters 586, *read* 2 Peters.
"	"	"	11, *for* sect, *read* sec.
"	"	"	23, *for* relied, *read* rely.
"	56,	"	26, *for* the, *read* and the.
"	"	"	35, *for* have, *read* having.
"	"	"	38, *for* .' *read* .
"	188,	"	14, after debt, insert "
"	197,	"	6, *for* pretence, *read* pretended.
"	198,	"	33, *for* Croke, *read* Croke Car.
"	"	"	36, *for* case, in, *read* case in.
"	256,	"	35, *for* I think, *read* and I think.
"	260,	"	4, *for* by, *read* of.
"	"	"	19, *for* Atkyn's, *read* Atkyns.
"	262,	"	9, *for* Eskine, *read* Erskine.
"	"	"	13, *for* Bradley, *read* Bradby.
"	294,	"	22, *for* R, *read* H.
"	295,	"	29, *for* Learey, *read* Searey.
"	"	"	30, *for* 4 Hayne's Ten. Rep., *read* 4 Hayw. Ten. Rep.
"	298,	"	16, *for* lands, *read* land.
"	"	"	17, *for* or which had been previously surveyed, *read or which had been previously surveyed.*
"	"	"	37, *for* Neal vs. E. T. College, *read* University vs. Cambreling.
"	299,	"	36, *for* R, *read* H.
"	467,	"	19, *for* explanations, *read* explanation.

VOL. XIII.

"	118,	"	3, *for* fix the fraud, *read* fix fraud.
"	202,	"	36, *for* a, *read* as.
"	448,	"	29, *for* certificates, *read* certificate.
"	450,	"	4, *for* enactment, *read* ejectment.
"	607,	"	25, *for* appertained, *read* appertains.
"	608,	"	9, *for* shall, *read* should.
"	"	"	25, *for* implication, *read implication.*
"	"	"	27, *for* intended, *read intended.*

Page 608, line 38, and wherever it occurs, *for* M'Cluny, *read* M'Clung.

" " " " erase 5 Cond. Rep. 197.

" " " 42, *for* concurrent, *read concurrent.*

" " " 44, *for* cognizance, *read cognizance.*

" " " 46, *for* powers, *read powers.*

" " " 50, *for* "concurrent," *read concurrent.*

" 609, " 10, *for* powers, *read powers.*

" " " 12, *for* Power, *read Power.*

" " " 14, *for* jurisdiction, *read jurisdiction.*

" " " 36, *for* usuges, *read* usages.

" 610, " 29, *for* not by, *read* not.

" " " 34, *for* then established, *read* (then established.)

" " " 39, *for* powers, *read powers.*

" " " 43, *for* jurisdiction, *read jurisdiction.*

" " " 44, *for* Court, *read* Courts.

" 611, " 1, *for* or jurisdiction "to hold plea," *read* (or jurisdiction "to hold plea.")

" " " 2, *for* all cases, *read all cases.*

" " " 8, *for* as I think, *read* (as I think.)

" " " 9, *for* cognizance of all cases in law and equity, *read cognizance of all cases in law and equity.*

" " " 24, 28, *for* a case, *read a case.*

" " " 32, *for* description of person, *read description of person.*

" " " 39, *for* private remedy, *read private remedy.*

" 612, " 11, *for* by implication, *read by implication.*

" " " 17, *for* there can be little room for doubt, *read* (there can be little room for doubt.)

VOL. XIV.

" 17, " 39, 46, *for* Hawkins', *read* Hawkins.

" 280, " 7, *for* making, *read* marking.

" " " 27, *for* or of every, *read* or every.

" 320, " 42, *for* custom, *read* customs.

Page 321, line 10, *for* for, *read* to.
" 347, " 8, *for* distinguished, *read* distinguishable.
" 349, " 29, *for* concession, *read* cession
" 351, " 14, *for* the Court, *read* this Court.
" 427, " 16, *for* in the 30, *read* on the 31st.
" 518, " 32, *for* What, *read* That.
" 520, " 40, *for* have, *read* had.
" 521, " 19, *for* powers, *read* power.
" 522, " 38, *for* wants, *read* want.
" 597, " 14, *for* of a, *read* of an unjust.
" " " 49, *for* than one, *read* than the one.

VOL. XV.

" 184, " 26, *for* 6 Peters 691, *read* 13th Peters 88.
" 330, " 3, 6, *for* Deputation, *read* Deputations.
" 331, " 4, *for* Supreme, *read* Superior.
" 332, " 22, *for* certainly partly, *read* certainly to lie partly.

VOL. XVI.

" 146, " 7, *for* Front, *read* Trout.
" 166, " 30, *for* to the, *read* of the.
" 226, " 16, *for* officer, *read* officers.
" 200, " 28, *for* The same evidence, it follows, *read* It follows, the same evidence.
" 226, " 28, *for* refuses, *read* refused.
" 248, " 36, *for* are, *read* is.
" 249, " 9, *for* Borland, *read* Barlard.
" " " 30, *for* This Court say, *read* This Court says.
" 253, " 9, 21, 29, *for* original states, *read* original States.
" 254, " 33, *for* covered with water? But, *read* covered with water; but.
" 255, " 7, *for* rivers, *read* waters.
" " " 27, *for* water. These lands, *read* water; these lands.
" " " 30, *for* land, *read* lands.

Page 255, line 34, *for* on the surface of the river, *read* on its surface.
" 256, " 23, *for* that those, *read* those.
" " " 34, *for* river, *read* rivers.
" 257, " 19, *for* 8 Peters 1 to 25, *read* 8 Porters Rep. 1 to 25.
" " " 25, *for* act of July, *read* act of the — of July.
" " " 30, *for* grant; *read* grant,
" 258, " 17, *for* decision, *read* decisions.
" 260, " 19, *for* charged, *read* charges.
" 266, " 9, *for* and as the, *read* and the.
" " " 11, *for* according to the English common law, *read* (according to the English common law.)
" " " 12, *for* land, *read* lands.
" " " 21, *for* 8 James 1, *read* (in 8 James 1.)
" " " 22, 31, *for* Sir John Dovy, *read* Sir John Davy.
" " " 25, *for* Carter v. Muscot, Burr Rep. 2162, it, *read* Carter v. Murcot (Burr Rep. 2162) in.
" " " 38, *for* 355, *read* 354.
" 267, " 3, *for* Hogan, *read* Hagan.
" " " 15, *for* where, *read* when.
" 285, " 35, *for* modes, *read* mode.
" 288, " 23, *for* rate, *read* rents.
" 290, " 11, *for* exemptions, *read* exemption.
" 486, " 18, *for* the, *read* which.
" " " " *for* presented, *read* prosecuted.
" 487, " 10, *for* proceedings, *read* proceeding.
" 488, " 6, *for* were, *read* was.
" 489, " 11, *for* If barred to the right of, *read* If barred of the right to.
" 490, " 10, *for* rents, *read* rates.
" " " 37, *for* nor, *read* or.
" 492, " 6, *for* title, *read* bill.
" 493, " 31, *for* statute, and none, *read* statute, none.
" 494, " 9, *for* recited, *read* cited.

THE

RULES AND ORDERS

OF THE

SUPREME COURT

OF THE

UNITED STATES,

FROM THE

YEAR 1790 TO 1843.

RULES AND ORDERS.

I.—FEBRUARY 3, 1790.

Ordered, That JOHN TUCKER, Esq., of Boston, be the Clerk of this Court.

That he reside and keep his office at the seat of the National Government, and that he do not practise either as an Attorney or Counsellor in this Court while he shall continue to be Clerk of the same.

II.—FEBRUARY 5, 1790.

Ordered, That (until further orders) it shall be requisite to the admission of Attorneys or Counsellors to practise in this Court, that they shall have been such for three years past in the Supreme Courts of the State to which they respectively belong, and that their private and professional character shall appear to be fair.

III.—FEBRUARY 5, 1790.

Ordered, That Counsellors shall not practise as Attorneys, nor Attorneys as Counsellors, in this Court. (*See Rule* 14.)

IV.—FEBRUARY 5, 1790.

Ordered, That they shall respectively take the following oath, viz.: "I do solemnly swear that I will demean myself (as an attorney or Counsellor of the Court) uprightly, and according to law; and that I will support the Constitution of the United States." (*See Rule* 6.)

V.—FEBRUARY 5, 1790.

Ordered, That (unless and until it shall otherwise be provided by law) all process of this Court shall be in the name of the President of the United States.

VI.—FEBRUARY 7, 1791.

Ordered, That the Counsellors and Attorneys admitted to practice in this Court shall take either an oath, or in proper cases, an affirmation, of the tenor prescribed by the rule of his Court on that subject, made February Term, 1790, viz.: "I do solemnly swear (or affirm, as the case may be) that I will demean myself, as an Attorney or Counsellor of this Court, uprightly, and according to law; and that I will support the Constitution of the United States."

VII.—AUGUST 8, 1791.

The Chief Justice, in answer to the motion of the Attorney General, made yesterday, informs him and the Bar, that this Court consider the practice of the Courts of King's Bench, and of Chancery, in England, as affording outlines for the practice of this Court, and that they will, from time to time, make such alterations therein as circumstances may render necessary.

VIII.—FEBRUARY 4, 1795.

The court give notice to the gentlemen of the Bar, that hereafter they will expect to be furnished with a statement of the material points of the case from the Counsel on each side of a cause. (*See Rule* 29.)

IX.—FEBRUARY 17, 1795.

The Court declared, that all evidence on motion for a discharge upon bail must be by way of *deposition*, and not *viva voce*.

X.—AUGUST 12, 1796.

Ordered, That when process at Common Law, or in Equity, shall issue against a State, the same shall be served on the Go-

vernor, or Chief Executive Magistrate, and Attorney General of such State.

Ordered, That process of subpœna, issuing out of this Court, in any suit in Equity, shall be served on the defendant sixty days before the return day of the said process; and further, that if the defendant, on such service of the subpœna, shall not appear at the return day contained therein, the complainant shall be at liberty to proceed *ex parte*.

XI.—FEBRUARY 13, 1797.

It is ordered by the Court, that the Clerk of the Court to which any writ of error shall be directed may make return of the same, by transmitting a true copy of the record, and of all proceedings in the cause, under his hand and the seal of the Court. (*See Rule* 31.)

XII.—AUGUST 7, 1797.

It is ordered by the Court, that no record of the Court be suffered by the Clerk to be taken out of his office but by the consent of the Court; otherwise, to be responsible for it. (*See Rule* 35.)

XIII.—AUGUST 15, 1800.

IN THE CASE OF COURSE *vs.* STEAD'S EXECUTORS.

Ordered, That the plaintiff in error be at liberty to show, to the satisfaction of this Court, that the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs; this to be made appear by affidavit, on days' notice to opposite party, or their Counsel in Georgia.

Rule as to affidavits to be mutual.

XIV.—AUGUST 12, 1801.

Ordered, That Counsellors may be admitted as Attorneys in this Court on taking the usual oath. (*See Rule* 3.)

XV.—DECEMBER 9, 1801.

It is ordered, That in every case where the defendant in error

fails to appear, the plaintiff may proceed *ex parte*. (*See Rules* 19 *and* 30.)

XVI.—FEBRUARY TERM, 1803.

It is ordered, That where the writ of error issues within thirty days before the meeting of the Court, the defendant in error is at liberty to enter his appearance, and proceed to trial; otherwise, the cause must be continued. (*See Rules* 19 *and* 30.)

XVII.—FEBRUARY TERM, 1803.

In all cases where a writ of error shall delay the proceedings on the judgment of the Circuit Court, and shall appear to have been sued out merely for delay, damages shall be awarded, at the rate of *ten per centum per annum* on the amount of the judgment. (*See Rule* 20.)

XVIII.—FEBRUARY TERM, 1803.

In such cases, where there exists a real controversy, the damages shall only be at the rate of *six per centum per annum*. In both cases the interest is to be computed as part of the damages. (*See Rule* 20.)

XIX.—FEBRUARY TERM, 1806.

All causes, the records in which shall be delivered to the Clerk on or before the sixth day of a term, shall be considered as for trial in the course of that term. Where the record shall be delivered after the sixth day of the term, either party will be entitled to a continuance. In all cases where a writ of error shall be a supersedeas to a judgment rendered in any Circuit Court of the United States, except that for the District of Columbia, at least thirty days previous to the commencement of any term of this Court, it shall be the duty of the plaintiff in error to lodge a copy of the record with the Clerk of this Court within the first six days of the term; and if he shall fail so to do, the defendant in error shall be permitted afterwards to lodge a copy of the record with the Clerk, and the cause shall stand for trial in like manner as if the record had come up within the first six days; or he may,

on producing a certificate from the Clerk stating the cause, and that a writ of error has been sued out, which operates as a supersedeas to the judgment, have the said writ of error docketed and dismissed. This rule shall apply to all judgments rendered by the Court for the District of Columbia at any time prior to a session of this Court.

In cases not put to issue at the August term, it shall be the duty of the plaintiff in error, if errors shall not have been assigned in the Court below, to assign them in this Court at the commencement of the term, or so soon thereafter as the record shall be filed with the Clerk, and the cause placed on the docket; and if he shall fail so to do, and shall also fail to assign them when the cause shall be called for trial, the writ of error may be dismissed at his costs; and if the defendant shall refuse to plead to issue, and the cause shall be called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the cause; and that where there is no appearance for the plaintiff in error, the defendant may have the plaintiff called, and dismiss the writ of error; or may open the record, and pray for an affirmance. In such a case *costs go of course*. Montalet *vs.* Murray. (*See Rules* 30 and 43.)

XX.—FEBRUARY TERM, 1807.

It is ordered, That where damages are given by the rule passed in February term, 1803, the said damages shall be calculated to the day of the affirmance of the judgment in this Court. (*See Rules* 17 *and* 18.)

XXI.—FEBRUARY TERM, 1808.

1st. *Ordered*, That all parties of this Court, not being residents of the United States, shall give security for the costs accruing in this Court, to be entered on the record.

2d. *Ordered*, That upon the Clerk of this Court producing satisfactory evidence, by affidavit, or the acknowledgment of the parties or their sureties, of having served a copy of the bill of costs due them respectively, in this Court, on such parties or their

sureties, an attachment shall issue against such parties or sureties respectively, to compel payment of said costs.

XXII.—FEBRUARY TERM, 1810.

Ordered, That upon the reversal of a judgment or decree of the Circuit Court, the party in whose favour the reversal is shall recover his costs in the Circuit Court.

XXIII.—FEBRUARY TERM, 1812.

It is ordered, That only two Counsel be permitted to argue for each party, plaintiff and defendant, in a cause.

XXIV.—FEBRUARY TERM, 1812.

There having been two Associate Justices of the Court appointed since its last session, *It is ordered*, that the following allotment be made of the Chief Justice and the Associate Justices of the said Supreme Court, among the circuits, agreeably to the act of Congress in such case made and provided; and that such allotment be entered on record, viz.:

For the first circuit—the Hon. JOSEPH STORY.

* For the second circuit—the Hon. BROCKHOLST LIVINGSTON.

For the third circuit—the Hon. BUSHROD WASHINGTON.

For the fourth circuit—the Hon. GABRIEL DUVALL.

For the fifth circuit—the Hon. JOHN MARSHALL, *C. J.*

For the sixth circuit—the Hon. WILLIAM JOHNSON.

For the seventh circuit—the Hon. THOMAS TODD.

XXV.—FEBRUARY TERM, 1816.

It is ordered by the Court, That in all cases where further proof is ordered by the Court, the depositions which shall be taken shall be by a commission to be issued from this Court, or from any Circuit Court of the United States. (*See Rule* 27.)

* The Honourable SMITH THOMPSON having been appointed Associate Justice of the Supreme Court, in the place of the Honourable BROCKHOLST LIVINGSTON, deceased, the President of the United States assigned to him the second circuit, by an instrument dated the day of A. D. one thousand eight hundred and twenty-three.

XXVI.—FEBRUARY TERM, 1817.

Whenever it shall be necessary or proper, in the opinion of the presiding judge in any Circuit Court, or District Court exercising Circuit Court jurisdiction, that original papers of any kind should be inspected in the Supreme Court, upon appeal, such presiding judge may make such rule or order for the safe keeping, transporting, and return of such original papers, as to him may seem proper; and this Court will receive and consider such original papers in connection with the transcript of the proceedings.

XXVII.—FEBRUARY TERM, 1817.

In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this Court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this Court, or from any Circuit Court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross interrogatories within twenty days from the service of such notice: *Provided, however,* that nothing in this rule shall prevent any party from giving oral testimony in open court in cases where, by law, it is admissible. (*See Rule* 25.)

XXVIII.—FEBRUARY TERM, 1821.

Whenever, pending a writ of error or appeal in this Court either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the cause shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order, that unless such representatives shall become parties within the first ten

days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing have the same reversed if it be erroneous: *Provided, however*, that a copy of every such order shall be printed in some newspaper at the seat of Government in which the laws of the United States shall be printed by authority, for three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing.—*March* 8, 1821.

XXIX.—FEBRUARY TERM, 1821.

Ordered, After the present term no cause standing for argument will be heard by the Court until the parties shall have furnished the Court with a printed brief or abstract of the cause, containing the substance of all the material pleadings, facts, and documents on which the parties rely, and the points of law and fact intended to be presented at the argument.—*March* 10, 1821. (*See Rule* 8.)

XXX.—FEBRUARY TERM, 1821.

In all cases where a writ of error or an appeal shall be brought to this Court from any judgment or decree rendered thirty days before the term to which such writ of error or appeal shall be returnable, it shall be the duty of the plaintiff in error, or appellant, as the case may be, to docket the cause, and file the record thereof with the Clerk of this Court within the first six days of the term; on failure to do which, the defendant in error, or appellee, as the case may be, may docket the cause, and file a copy of the record with the Clerk, and thereupon the cause shall stand for trial in like manner as if the record had been duly filed within the first six days of the term; or at his option he may have the cause docketed and dismissed, upon producing a certificate from the Clerk of the Court wherein the judgment or decree was rendered, stating the cause, and certifying that such writ of error or appeal has been duly sued out and allowed. —*March* 14, 1821. (*See Rules* 19 *and* 43.)

XXXI.—MARCH 14, 1823.

No cause will hereafter be heard until a complete record, containing in itself, without references *aliunde*, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this Court, shall be filed. (*See Rule* 11.)

FEBRUARY TERM, 1824.

There having been one Associate Justice of the Supreme Court appointed since its last session, *It is ordered*, that the following allotment be made by the Chief Justice and the Associate Justices of the said Supreme Court among the circuits, agreeably to the act of Congress in such case made and provided; and that such allotment be entered on record, viz.:

For the first circuit—the Hon. JOSEPH STORY.
For the second circuit—the Hon. SMITH THOMPSON.
For the third circuit—the Hon. BUSHROD WASHINGTON.
For the fourth circuit—the Hon. GABRIEL DUVALL.
For the fifth circuit—the Hon. JOHN MARSHALL, *C. J.*
For the sixth circuit—the Hon. WILLIAM JOHNSON.
For the seventh circuit—the Hon. THOMAS TODD.

XXXII.—FEBRUARY TERM, 1824.

No certiorari for diminution of the record shall be hereafter awarded in any cause, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such certiorari shall be made at the first term of the entry of the cause; otherwise, the same shall not be granted, unless upon special cause shown to the Court, accounting satisfactorily for the delay.

XXXIII.—FEBRUARY TERM 1824.

In all cases of equity and admiralty jurisdiction heard in this Court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence, unless objection was taken

thereto in the Court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

XXXIV.—FEBRUARY TERM, 1824.

On Saturday of each week during the sitting of the Court, motions in cases not required by the rules of the Court to be put upon the docket shall be entitled to preference, if such motions shall be made before the Court shall have entered upon the hearing of a cause upon the docket.

XXXV.—FEBRUARY TERM, 1825.

Ordered, That after the present term no original record shall be taken from the Supreme Court Room, or from the office of the Clerk of this Court.—*February* 19. (*See Rule* 12.)

JANUARY TERM, 1827.

There having been one Associate Justice of the Supreme Court appointed since its last session, *It is ordered*, that the following allotment be made of the Chief Justice and the Associate Justices of the said Supreme Court among the circuits, agreeably to the act of Congress in such case made and provided; and that such allotment be entered on record, viz.:

For the first circuit—the Hon. JOSEPH STORY.
For the second circuit—the Hon. SMITH THOMPSON.
For the third circuit—the Hon. BUSHROD WASHINGTON.
For the fourth circuit—the Hon. GABRIEL DUVALL.
For the fifth circuit—the Hon. JOHN MARSHALL, *C. J.*
For the sixth circuit—the Hon. WILLIAM JOHNSON.
For the seventh circuit—the Hon. ROBERT TRIMBLE.

JANUARY TERM, 1830.

There having been two Associate Justices of the Supreme Court appointed since its last session, *It is ordered*, that the following allotment be made of the Chief Justice and the Associate Justices of the said Supreme Court among the circuits, agreeably to the act of Congress in such case made and provided; and that such allotment be entered on record, viz.:

For the first circuit—the Hon. JOSEPH STORY.
For the second circuit—the Hon. SMITH THOMPSON.
For the third circuit—the Hon. HENRY BALDWIN.
For the fourth circuit—the Hon. GABRIEL DUVALL.
For the fifth circuit—the Hon. JOHN MARSHALL, *C. J.*
For the sixth circuit—the Hon. WILLIAM JOHNSON.
For the seventh circuit—the Hon. JOHN MCLEAN.

XXXVI.—JANUARY TERM, 1830.

The Court, on the second day in each term hereafter, will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the term, in the same order; and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed in the argument, the cause shall go down to the foot of the docket, unless some good and satisfactory reason to the contrary shall be shown to the Court. That ten causes only shall be considered as liable to be called on each day during the term, including the one under argument, if the same shall not be concluded on the preceding day. No cause shall be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances to be shown to the Court. Every cause which shall have been twice called in its order, and passed, and put at the foot of the docket, shall, if not again reached during the term it was called, be continued to the next term of the Court.

XXXVII.—JANUARY TERM, 1831.

1. In all cases the Clerk shall take of the plaintiff a bond with competent security, to respond to costs, in the penalty of two hundred dollars; or a deposite of that amount to be placed in bank subject to his draft.

2. In all cases the Clerk shall have fifteen copies of the records printed for the Court, provided the Government will admit the item in the expenses of the Court.

3. In all cases the Clerk shall deliver a copy of the printed record to each party. And in cases of dismission (except for

want of jurisdiction) or affirmance, one copy of the record shall be taxed against the plaintiff, which charge includes the charge for the copy furnished him.

In case of reversal and dismission for want of jurisdiction, each party shall be charged with one-half the legal fees for a copy.

XXXVIII.—JANUARY TERM, 1832.

It is ordered by the Court, That hereafter the Judges of the Circuit and District Courts do not allow any bill of exceptions, which shall contain the charge of the Court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But that the party excepting be required to state distinctly the several matters of law in such charge to which he excepts; and that such matters of law, and those only, be inserted in the bill of exceptions, and allowed by the Court.

XXXIX.—JANUARY TERM, 1833.

1. *It is ordered by the Court*, That during the session of the Court, any gentleman of the bar having a cause on the docket, and wishing to use any book or books in the Law Library, shall be at liberty, upon application to the Clerk of the Court, to receive an order to take the same (not exceeding at any one time three) from the Library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the Clerk. And it shall be the duty of the Clerk to keep, in a book for that purpose, a record of all books so delivered, which are to be charged against the party receiving the same. And in case the same shall not be so returned, the party receiving the same shall be responsible for, and forfeit and pay twice the value thereof; as also one dollar per day for each day's detention beyond the limited time.

2. *It is ordered by the Court*, That during the session of the Court, any Judge thereof may take from the Law Library any book or books he may think proper, he being responsible for the due return thereof.

XL.—JANUARY TERM, 1833.

Whereas, It has been represented to the Court, that it would in many cases accommodate Counsel, and save expense to parties, to submit causes upon printed arguments. It is therefore

Ordered, That in all cases brought here on appeal, writ of error, or otherwise, the Court will receive printed argun ents, if the Counsel on either or both sides shall choose so to submit the same.

XLI.—1834.

Ordered, That the original opinions of the Court, delivered to the reporter, be filed in the office of the Clerk of the Court for preservation as soon as the volume of Reports for the term, at which they are delivered, shall be published.

XLII.—1835.

All the opinions delivered by the Court since the commencement of the term shall be forthwith delivered over to the Clerk to be recorded.

And all opinions hereafter delivered by the Court shall immediately, upon the delivery thereof, be in like manner delivered over to the Clerk to be recorded. And it shall be the duty of the Clerk to cause the same to be forthwith recorded, and to deliver the originals with a transcript of the judgment or decree of the Court thereon to the reporter, as spon as the same shall be recorded.

And all the opinions of the Court, as far as practicable, be recorded during the term, so that the publication of the reports may not be delayed thereby.

XLIII.—1835.

1. In all cases where a writ of error, or an appeal, shall be brought to this Court from any judgment or decree rendered thirty days before the commencement of the term, it shall be the duty of the plaintiff in error, or appellant, as the case may be, to docket the cause and file the record thereof with the Clerk of

this Court within the first six days of the term. If he shall fail so to do, the defendant in error, or appellee, as the case may be, may docket the cause and file a copy of the record with the Clerk, in which case it shall stand for argument at the term; or at his option he may have the cause docketed and dismissed upon producing a certificate from the Clerk of the Court, wherein the judgment or decree was rendered, stating the cause, and certifying that such writ of error, or appeal, had been duly sued out and allowed.

2. No writ of error or appeal shall be docketed, or the record of the cause filed by the plaintiff in error, or appellant, after the first six days of the term, except upon the terms that the cause shall stand for argument during the term, or be continued at the option of the defendant in error, or appellee. But in no case shall the plaintiff in error, or appellant, be entitled to docket the cause and file the record, after the same shall have been docketed and dismissed in the manner provided for in the preceding rule, unless by order of the Court or with the consent of the opposite party.

3. In all cases where the cause shall not be docketed and the record filed with the Clerk by either party until after thirty days from the commencement of the term, the cause shall stand continued until the next term. (*See Rules* 19 *and* 30.)

XLIV.—1837.

When a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by Counsel.

XLV.—1838.

In all cases where any suit shall be dismissed in this Court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed for the defendant in error, or appellee, as the case may be, unless otherwise agreed by the parties.

In all cases of affirmance of any judgment or decree in this Court costs shall be allowed to the defendant in error or appellee, as the case may be, unless otherwise ordered by the Court.

In all cases of reversals of any judgment or decree in this Court, except where the reversal shall be for want of jurisdiction, costs shall be allowed in this Court for the plaintiff in error or appellant, as the case may be, unless otherwise ordered by the Court.

Neither of the foregoing rules shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this Court for or against the United States.

In all cases of the dismissal of any suit in this Court, it shall be the duty of the Clerk to issue a mandate, or other proper process, in the nature of a procedendo, to the Court below, for the purpose of informing such Court of the proceedings in this Court, so that further proceedings may be had in such Court as to law and justice may appertain.

When costs are allowed in this Court, it shall be the duty of the Clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the Court below, and annex to the same the bill of items taxed in detail.

XLVI.—1838.

All motions hereafter made to the Court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

XLVII.—1838.

The Court will, at every future session, announce on what day it will adjourn at least ten days before the time which shall be fixed upon; and the Court will take up no case for argument, nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment.

XLVIII.—1841.

Ordered, That the Clerk take charge of the Books of the Court, together with such of the duplicate law books as Congress may direct to be transferred to the Court, and arrange them in the conference room, which he shall have fitted up in a proper man-

ner; and that he do not permit such books to be taken therefrom by any one except the Judges of the court.

XLIX.—1842.

Ordered, That printed arguments will not be received under the fortieth rule of the court, unless filed within forty days from the commencement of the term, except in cases which are reached in the regular call of the docket.

RULES OF PRACTICE

FOR THE

COURTS OF EQUITY

OF THE UNITED STATES,

PROMULGATED BY THE

SUPREME COURT

OF THE UNITED STATES.

JANUARY TERM, 1842.

RULES OF PRACTICE, &c.

PRELIMINARY REGULATIONS.

I.

THE Circuit Courts, as Courts of Equity, shall be deemed always open for the purpose of filing bills, answers and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules and other proceedings, preparatory to the hearing of all causes upon their merits.

II.

The clerk's office shall be open, and the clerk shall be in attendance therein on the first Monday of every month, for the purpose of receiving, entering, entertaining and disposing of all motions, rules, orders and other proceedings, which are grantable of course and applied for, or had by the parties, or their solicitors in all causes pending in equity, in pursuance of the rules hereby prescribed.

III.

Any Judge of the Circuit Court, as well in vacation as in term, may, at chambers, or on the rule days, at the clerk's office, make and direct all such interlocutory orders, rules and other proceedings, preparatory to the hearing of all causes upon their merits, in the same manner and with the same effect as the Circuit Court could make and direct the same in term, reasonable notice of the

application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary at the next rule day thereafter, unless some other time is assigned by the judge for the hearing.

IV.

All motions, rules, orders and other proceedings made and directed at chambers, or on rule days at the clerk's office, whether special or of course, shall be entered by the clerk in an order book, to be kept at the clerk's office on the day when they are made and directed—which book shall be open at all office hours, to the free inspection of the parties in any suit in equity, and their solicitors. And except in cases where personal or other notice is specially required or directed, such entry in the order book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices and other proceedings entered in such order book, touching any and all the matters in the suits, to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the Judges of the Circuit Court may, by rule, abridge the time for notice of rules, orders or other proceedings, not requiring personal service on the parties, in their discretion.

V.

All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees, for filing bills, answers, pleas, demurrers and other pleadings; for making amendments to bills and answers; for taking bills pro confesso; for filing exceptions, and for other proceedings in the clerk's office, which do not, by the rules hereinafter prescribed, require an allowance or order of the court, or of any judge thereof, shall be deemed motions and applications, grantable of course by the clerk of the court. But the same may be suspended, or

altered, or rescinded by any judge of the court, upon special cause shown.

VI.

All motions for rules or orders and other proceedings, which are not grantable of course, or without notice, shall, unless a different time be assigned by a judge of the court, be made on a rule day, and entered in the order book, and shall be heard at the rule day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court ex parte, and granted, as if not objected to, or refused, in his discretion.

PROCESS.

VII.

The process of subpœna shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and unless otherwise provided in these rules, or specially ordered by the Circuit Court, a writ of attachment, and if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedence to any interlocutory or final order or decree of the court.

VIII.

Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the Circuit Court in suits at common law in actions of assumpsit. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land, or the delivering up of deeds, or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound without further service to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within

the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate upon the return of non est inventus, to compel obedience to the decree.

IX.

When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

X.

Every person, not being a party in any cause, who has obtained an order, or in whose favour an order shall have been made, shall be enabled to enforce obedience to such order by the same process, as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such order, as if he were a party in the cause.

SERVICE OF PROCESS.

XI.

No process of subpœna shall issue from the clerk's office in any suit in equity, until the bill is filed in the office.

XII.

Whenever a bill is filed, the clerk shall issue the process of subpœna thereon, as of course, upon the application of the plaintiff, which shall be returnable into the clerk's office the next rule day, or the next rule day but one, at the election of the

plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpœna shall be placed a memorandum, that the defendant is to enter his appearance in the suit in the clerk's office, on or before the day, at which the writ is returnable; otherwise, the bill may be taken pro confesso. Where there are more than one defendants, a writ of subpœna may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife, defendants, or a joint subpœna against all the defendants.

XIII.

The service of all subpœnas shall be by a delivery of a copy thereof by the officer serving the same, to the defendant personally, or, in case of husband and wife, to the husband personally, or by leaving a copy thereof at the dwelling house or usual place of abode of each defendant, with some free white person, who is a member or resident in the family.

XIV.

Whenever any subpœna shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpœna, toties quoties, against such defendant, if he shall require it, until due service is made.

XV.

The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise; in the latter case, the person serving the process shall make affidavit thereof.

XVI.

Upon the return of the subpœna, as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry.

APPEARANCE.

XVII.

The appearance day of the defendant shall be the rule day, to which the subpœna is made returnable; provided, he has been served with the process twenty days before that day; otherwise, his appearance day shall be the next rule day succeeding the rule day, when the process is returnable.

The appearance of the defendant, either personally or by his solicitor, shall be entered in the order book on the day thereof by the clerk.

BILLS TAKEN PRO CONFESSO.

XVIII.

It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court upon motion for that purpose, to file his plea, demurrer, or answer to the bill in the clerk's office, on the rule day next succeeding that of entering his appearance: in default thereof, the plaintiff may, at his election, enter an order (as of course) in the order book, that the bill be taken pro confesso; and thereupon the cause shall be proceeded in ex parte, and the matter of the bill may be decreed by the court at the next ensuing term thereof accordingly, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant, to compel an answer; and the defendant shall not, when arrested upon such process, be discharged therefrom, unless, upon filing his answer, or otherwise complying with such order, as the court or a judge thereof may direct, as to pleading to, or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause.

XIX.

When the bill is taken pro confesso, the court may proceed to

a decree at the next ensuing term thereof, and such a decree rendered shall be absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant. And no such motion shall be granted, unless upon the payment of the costs of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

FRAME OF BILLS.

XX.

Every bill, in the introductory part thereof, shall contain the names, places of abode, and citizenship, of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: "To the Judges of the Circuit Court of the United States for the District of ——. A. B., of ——, and a citizen of the State of ——, brings this, his bill, against C. D., of ——, and a citizen of the State of ——, and E. F., of ——, and a citizen of the State of ——. And thereupon your orator complains and says, that, &c."

XXI.

The plaintiff, in his bill, shall be at liberty to omit, at his option, the part, which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses, which the defendant is supposed to intend to set up by way of defence to the bill; also, what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law; and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or stating part of his bill, state and avoid,

by counter-averments, at his option, any matter or thing, which he supposes will be insisted upon by the defendant, by way of defence or excuse, to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief, to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of ne exeat regno, or any other special order pending the suit, is required. it shall also be specially asked for.

XXII.

If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties there, the bill shall aver the reason, why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to the other parties. And as to persons, who are without the jurisdiction, and may properly be made parties, the bill may pray, that process may issue to make them parties to the bill, if they should come within the jurisdiction.

XXIII.

The prayer for process of subpœna in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon as justice may require, upon the return of the process. If an injunction, or a writ of ne exeat regno, or any other special order pending the suit, is asked for in the prayer for relief, that shall be sufficient without repeating the same in the prayer for process.

XXIV.

Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part, that upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

XXV.

In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness, and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no case exceed the sum, which is allowed in the State Court of Chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer.

SCANDAL AND IMPERTINENCE IN BILLS.

XXVI.

Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts or other instruments, in haec verba, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may on exceptions be referred to a master by any judge of the court for impertinence, or scandal, and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order. If the master shall report, that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.

XXVII.

No order shall be made by any judge for referring any bill, answer, or pleading, or other matter, or proceeding depending before the court for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages, which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule day, after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the

party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule day, or the master shall certify, that further time is necessary for him to complete the examination.

AMENDMENTS OF BILLS.

XXVIII.

The plaintiff shall be at liberty as a matter of course, and without payment of costs, to amend his bill in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filling blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point (as he may do of course), after a copy has been so taken, before any answer or plea, or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall without delay furnish him a fair copy thereof, free of expense, with suitable references to the places, where the same are to be inserted. And if the amendments are numerous, he shall furnish in like manner to the defendant, a copy of the whole bill as amended, that if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.

XXIX.

After an answer, or plea, or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the court, to amend his bill on or before the next succeeding rule day, upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit, that the same is not made for the purpose of vexation or delay, or that the matter of the proposed

amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

XXX.

If the plaintiff, so obtaining any order to amend his bill after answer, or plea, or demurrer, or after replication, shall not file his amendments or amended bill as the case may require, in the clerk's office, on or before the next succeeding rule day, he shall be considered to have abandoned the same, and the cause shall proceed, as if no application for any amendment had been made.

DEMURRERS AND PLEAS.

XXXI.

No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant, that it is not interposed for delay; and if a plea, that it is true in point of fact.

XXXII.

The defendant may, at any time before the bill is taken for confessed, or afterwards with the leave of the court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case, in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea, and explicitly denying the fraud and combination, and the facts on which the charge is founded.

XXXIII.

The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him, as far as in law and equity they ought to avail him.

XXXIV.

If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period, unless the court shall be satisfied, that the defendant had good ground in point of law or fact to interpose the same, and it was not interposed vexatiously or for delay. And upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule day, or at such other period, as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof, the bill shall be taken against him, pro confesso, and the matter thereof proceeded in and decreed accordingly.

XXXV.

If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable.

XXXVI.

No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

XXXVII.

No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter, as may be covered by such demurrer or plea.

XXXIII.

If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument, on the rule day, when the same is filed, or on the next succeeding rule day, he shall be deemed

to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose.

ANSWERS.

XXXIX.

The rule, that if a defendant submits to answer he shall answer fully to all the matters of the bill, shall no longer apply, in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defence (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters, than he would be compellable to answer and discover upon filing a plea, in bar, and an answer in support of such plea, touching the matters, set forth in the bill to avoid or repel the bar or defence. Thus, for example, a bonâ fide purchaser for a valuable consideration, without notice, may set up that defence by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.

XL.

A defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories, which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill, to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.

XLI.

The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, &c.; and the interrogatories, which each defendant is required to answer, shall be specified in a note at the foot of the bill, in the form or to the effect following; that is to say,--"The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3, &c.;" and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

XLII.

The note at the foot of the bill, specifying the interrogatories, which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note after the bill is filed, shall be considered and treated as an amendment of the bill.

XLIII.

Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words "To the end, therefore," there shall hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say,—

"1. Whether, &c.

"2. Whether, &c.

XLIV.

A defendant shall be at liberty, by answer, to decline answering any interrogatory or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill, from which he might have protected himself by demurrer.

XLV.

No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court, or a judge thereof, may in his discretion direct.

XLVI.

In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer, on or before the next succeeding rule day after that on which the amendment or amended bill is filed, unless the time therefor is enlarged or otherwise ordered by a judge of the court; and upon his default the like proceedings may be had as in cases of an omission to put in an answer.

PARTIES TO BILLS.

XLVII.

In all cases where it shall appear to the court, that persons, who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in their discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

XLVIII.

Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.

XLIX.

In all suits concerning real estate, which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate or the proceeds, or the rents and profits, in the same manner, and to the same extent, as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits; parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

L.

In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party, where he desires to have the will established against him.

LI.

In all cases in which the plaintiff has a joint and several demand against persons, either as principals or sureties, it shall not be necessary to bring before the court, as parties to a suit concerning such demand, all the persons liable thereto; but the

plaintiff may proceed against one or more of the persons severally liable.

LII.

Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order book, in the form or to the effect following; (that is to say,) "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objections shall then be allowed, be entitled as of course, to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.

LIII.

If a defendant shall, at the hearing of a cause, object, that a suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties.

NOMINAL PARTIES TO BILLS.

LIV.

Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpœna upon him, need not appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer, he shall be bound by all the proceedings in the cause. If the plaintiff shall

require him to appear and answer, he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

LV.

Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance and plead, demur or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be ex parte, if the adverse party does not appear at the time and place ordered. In every case, where an injunction, either the common injunction, or a special injunction, is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some order of the court.

BILLS OF REVIVOR AND SUPPLEMENTAL BILLS.

LVI.

Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same; which bill may be filed in the clerk's office at any time; and upon suggestion of the facts, the proper process of subpœna shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear, and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule day, which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course.

LVII.

Whenever any suit in equity shall become defective, from any event happening after the filing of the bill (as, for example, by a change of interest in the parties), or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule day, upon proper cause shown, and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead or answer thereto, on the next succeeding rule day, after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court.

LVIII.

It shall not be necessary in any bill of revivor, or supplemental bill, to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

ANSWERS.

LIX.

Every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any Circuit Court to take testimony or depositions, or before any master in chancery appointed by any Circuit Court. or before any judge of any court of a State or Territory.

AMENDMENT OF ANSWERS.

LX.

After an answer is put in, it may be amended as of course, in any matter of form, or by filling up a blank, or correcting a date, or reference to a document or other small matter, and be resworn, at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer. But after replica-

tion, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defences, or qualifying or altering the original statements, except by special leave of the court or of a judge thereof, upon motion and cause shown after due notice to the adverse party, supported, if required, by affidavit. And in every case where leave is so granted, the court, or the judge granting the same, may, in his discretion, require, that the same be separately engrossed and added as a distinct amendment to the original answer, so as tc be distinguishable therefrom.

EXCEPTIONS TO ANSWERS.

LXI.

After an answer is filed on any rule day, the plaintiff shall be allowed until the next succeeding rule day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court or a judge thereof; and if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

LXII.

When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had by two or more of the defendants separately, costs shall not be allowed for such separate answers or other proceedings, unless a master, upon reference to him, shall certify, that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.

LXIII.

Where exceptions shall be filed to the answer for insufficiency, within the period prescribed by these rules, if the defendant shall not submit to the same, and file an amended answer on the next succeeding rule day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule day there-

after, before a judge of the court; and shall enter, as of course, in the order book an order for that purpose. And if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer shall be deemed sufficient: provided, however, that the court, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.

LXIV.

If, at the hearing, the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto, on the next succeeding rule day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer and complying with such other terms, as the court or judge may direct.

LXV.

If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court, or the judge thereof, at the hearing upon the exceptions.

REPLICATION AND ISSUE.

LXVI.

Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule day thereafter; and in all cases where the general replication is filed, the cause shall be deemed to all intents and

purposes at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court or a judge thereof shall, upon motion for cause shown, allow a replication to be filed nunc pro tunc, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

TESTIMONY, HOW TAKEN.

LXVII.

After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same, in the Clerk's office, ten days' notice thereof being given to the adverse party to file cross interrogatories before the issuing of the commission; and if no cross interrogatories are filed at the expiration of the time, the commission may issue ex parte. In all cases the commissioner or commissioners shall be named by the court, or by a judge thereof. If the parties shall so agree, the testimony may be taken upon oral interrogatories by the parties or their agents, without filing any written interrogatories.

LXVIII.

Testimony may also be taken in the cause, after it is at issue, by deposition, according to the acts of Congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness either under a commission or by a new deposition taken under the acts of Congress, if a court or a judge thereof shall, under all the circumstances, deem it reasonable.

LXIX.

Three months, and no more, shall be allowed for the taking

of testimony after the cause is at issue, unless the court or a judge thereof shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions, containing the testimony, into the clerk's office, publication thereof may be ordered in the clerk's office by any judge of the court, upon due notice to the parties, or it may be enlarged, as he may deem reasonable under all the circumstances. But by consent of the parties, publication of the testimony may at any time pass into the clerk's office, such consent being in writing, and a copy thereof entered in the order book, or endorsed upon the deposition or testimony.

TESTIMONY DE BENE ESSE.

LXX.

After any bill filed, and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged or infirm, or going out of the country, or that any of them is a single witness to a fact, the clerk of the court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners as a judge of the court may direct, to take the examination of such witness or witnesses de bene esse, upon giving due notice to the adverse party of the time and place of taking his testimony.

FORM OF THE LAST INTERROGATORY.

LXXI.

The last interrogatory in the written interrogatories to take testimony now commonly in use, shall in the future be altered, and stated in substance thus: "Do you know, or can you set forth any other matter or thing, which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? if yea, set forth the same fully and at large in your answer."

CROSS BILL.

LXXII.

Where a defendant in equity files a cross bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto, before the original plaintiff shall be compellable to answer the cross bill. The answer of the original plaintiff to such cross bill may be read and used by the party filing the cross bill, at the hearing, in the same manner and under the same restrictions as the answer, praying relief, may now be read and used.

REFERENCE TO AND PROCEEDINGS BEFORE MASTERS.

LXXIII.

Every decree for an account of the personal estate of a testator or intestate, shall contain a direction to the master, to whom it is referred to take the same, to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct.

LXXIV.

Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance or for whose benefit the reference is made, shall cause the same to be presented to the master for a hearing on or before the next rule day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

LXXV.

Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties or their soli-

citors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed ex parte, or in his discretion to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay; and either party shall be at liberty to apply to the court or a judge thereof, for an order to the master to speed the proceedings, and to make his report, and to certify to the court or judge the reasons for any delay.

LXXVI.

In the reports made by the master to the court, no part of any state of facts, charge, affidavit, deposition, examination, or answer, brought in or used before them, shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer, shall be identified, specified, and referred to, so as to inform the court what state of facts, charge, affidavit, deposition, examination, or answer, were so brought in or used.

LXXVII.

The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, vivâ voce, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office, or by deposition according to the acts of Congress, or otherwise as hereinafter provided; and also to direct the mode, in which the matters requiring evidence, shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matter before him, which he may deem necessary and proper to the justice and merits thereof, and the rights of the parties.

LXXVIII.

Witnesses, who live within the district, may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpœna in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear, or to give evidence, it shall be deemed a contempt of court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses *vivâ voce* when produced in open court, if the court shall in its discretion deem it advisable.

LXXIX.

All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties, who shall not be satisfied with the accounts so brought in, shall be at liberty to examine the accounting party vivâ voce, or upon interrogatories in the master's office, or by deposition, as the master shall direct.

LXXX.

All affidavits, depositions and documents, which have been previously made, read, or used in the court, upon any proceeding in any cause or matter, may be used before the master.

LXXXI.

The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written inter-

rogatories, or vivâ voce, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examination shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court, if necessary.

LXXXII.

The Circuit Courts may appoint standing masters in chancery in their respective districts, both the judges concurring in the appointment; and they may also appoint a master pro hac vice in any particular case. The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the Circuit Court in its discretion, having regard to all the circumstances thereof; and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party, who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

EXCEPTIONS TO REPORT OF MASTER.

LXXXIII.

The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order book. The parties shall have one month from the time of filing the report, to file exceptions thereto; and if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule day after the month is expired. If exceptions are filed, they shall stand for hearing before the court, if the court is then in session, or if not, then at the next sitting of the court, which shall be held thereafter by adjournment or otherwise.

LXXXIV.

And in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party, whose exceptions are overruled, shall, for every exception overruled, pay costs to the other party, and for every exception allowed, shall be entitled to costs—the costs to be fixed in each case by the court, by a standing rule of the Circuit Court.

DECREES.

LXXXV.

Clerical mistakes in decrees, or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrolment thereof, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

LXXXVI.

In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin in substance as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz: [Here insert the decree or order.]

GUARDIANS AND PROCHEIN AMIS.

LXXXVII.

Guardians ad litem to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons, who are under guardianship, or otherwise incapable to sue for themselves; all infants and other persons so incapable, may sue by their guardians, if any, or by their prochein ami, subject, however, to

such orders as the court may direct for the protection of infants and other persons.

LXXXVIII.

Every petition for a rehearing shall contain the special matter or cause, on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party, or by some other person. No rehearing shall be granted after the term, at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

LXXXIX.

The Circuit Courts (both judges concurring therein) may make any other and further rules and regulations for the practice, proceedings and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

XC.

In all cases, where the rules prescribed by this court, or by the Circuit Court, do not apply, the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local convenience of the district, where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

XCI.

Whenever under these rules an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof, make solemn affirmation to the truth of the facts stated by him.

XCII.

These rules shall take effect, and be of force, in all the Circuit Courts of the United States, from and after the first day of August next; but they may be previously adopted by any Circuit Court in its discretion; and when and as soon as these Rules shall so take effect, and be of force, the Rules of Practice for the Circuit Courts in Equity Suits, promulgated and prescribed by this Court in March, 1822, shall henceforth cease, and be of no farther force or effect. And the clerk of this court is directed to have these Rules printed, and to transmit a printed copy thereof, duly certified, to the clerks of the several courts of the United States, and to each of the judges thereof.

I, WILLIAM THOMAS CARROLL, Clerk of the Supreme Court of the United States, do hereby certify that the foregoing ninety-two Rules have been ordered, by the said Supreme Court, to be the "*Rules of Practice in suits in Equity in the Circuit Courts.*'

Promulgated by the said Supreme Court, on this second day of March, in the year of our Lord one thousand eight hundred and forty-two.

Per Curiam:

Teste: WILLIAM THOMAS CARROLL,

Clerk of the Supreme Court of the United States.

SUPREME COURT OF THE UNITED STATES.

Hon. ROGER B. TANEY, Chief Justice.

Hon. JOSEPH STORY, (a) Associate Justice.

Hon. SMITH THOMPSON, (a) Associate Justice.

Hon. JOHN McLEAN, Associate Justice.

Hon. HENRY BALDWIN, Associate Justice.

Hon. JAMES M. WAYNE, Associate Justice.

Hon. JOHN CATRON, Associate Justice.

Hon. JOHN McKINLEY, (a) Associate Justice.

Hon. PETER V. DANIEL, Associate Justice.

Hugh S. Legaré, Esq., Attorney-General.

William Thomas Carroll, Esq., Clerk.

Benjamin C. Howard, Esq., Reporter.

Alexander Hunter, Esq., Marshal.

(a) Mr. Justice Story and Mr. Justice McKinley were prevented attending Court by indisposition; and Mr. Justice Thompson being compelled to leave Washington on the 6th of February, did not hear any arguments after that day.

ORDER OF COURT.

ORDERED by the Court, that in obedience to the act of Congress approved August 16th, 1842, the following allotment of circuits is made among the Justices of the said Court.

For the fourth circuit, ROGER B. TANEY, Chief Justice.

For the fifth circuit, JOHN MCKINLEY, Associate Justice.

For the sixth circuit, JAMES M. WAYNE, Associate Justice.

For the ninth circuit, PETER V. DANIEL, Associate Justice.

January 25th, 1843.

List of Attorneys admitted, January Term, 1843.

John Marshall Krum,	St. Louis, Missouri.
John Hogan,	Utica, New York.
John Lorimer Graham,	New York.
James Dunlop,	Pennsylvania.
Albert Constable,	Maryland.
James T. Morehead,	Kentucky.
L. W. Andrews,	Kentucky.
H. S. Lane,	Indiana.
J. L. White,	Indiana.
Ira A. Eastman,	N. Hampshire.
Lawrence B. Taylor,	Dist. of Columbia.
George C. Bates,	Michigan.
George Nicholson Johnson,	Richmond, Virginia.
W. H. Washington,	New Bern, N. Carolina.
B. A. Bidlack,	Pennsylvania.
John W. C. Leveridge,	New York.
John M. Read,	Pennsylvania.
George Armstrong,	Kentucky.
Robert H. Morris,	New York.
R. L. Caruthers,	Tennessee.
Milton Brown,	Tennessee.
Wm. Kinney,	Virginia.
P. S. Smith,	Florida.
A. P. Bagby,	Alabama.
D. Levy,	Florida.
Saml. L. Burritt,	E. Florida.
B. W. Bonney,	New York.
Wm. Coventry H. Waddell,	New York.
Henry C. Murphy,	New York.
J. W. Hamersley,	New York.
Constant Gilleu,	Philadelphia, Penn'a.
Job R. Tyson,	Philadelphia, Penn'a.
Robt. P. Fleuniken,	Pennsylvania.
William Silliman,	New York.
Ferdinand W. Hubbell,	Pennsylvania.
Harvey Baldwin,	Syracuse, New York.
R. Barnwell Rhett,	Charleston, S. Carolina.
Saml. Humes Porter,	Lancaster, Penn'a.
Benjamin F. Angel,	New York.
T. F. Foster,	Georgia.
James B. Colt,	Missouri.
J. M. Porter,	Pennsylvania.

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THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES,

AT

JANUARY TERM, 1843.

WILLIAM H. WILLIAMS, PLAINTIFF IN ERROR, *v.* JAMES ASH, DEFENDANT IN ERROR.

Mrs. T. Greenfield, of Prince George's county, Maryland, bequeathed to her nephew, Gerard T. Greenfield, certain slaves, with a proviso in her will, "that he shall not carry them out of the state of Maryland, or sell them to any one; in either of which events, I will and desire the said negroes shall be free for life." After the decease of the testator, in 1839, G. T. Greenfield sold one of the slaves, and a petition for freedom was thereupon filed in the Circuit Court of Washington county. The legatee continued to reside in Prince George's county, for two years after the decease of the testatrix, during which time the appellee was sold by him, and he afterwards removed to the state of Tennessee, where he had resided before the death of the testatrix. The Circuit Court instructed the jury, that by the sale, the petitioner became free. Held, that the instructions of the Circuit Court were correct.

A bequest of freedom to a slave, under the laws of Maryland, stands on the same principles with a bequest over to a third person. A bequest of freedom to a slave is a specific legacy.

The bequest of the testatrix of the slave to her nephew, under the restrictions imposed by the will, was not a restraint or alienation inconsistent with the right to the property bequeathed to the legatee. It was a conditional limitation of freedom, and took effect the moment the negro was sold.

IN error to the Circuit Court of the United States for the county of Washington, District of Columbia.

NOTE.—The report of this case was accidentally omitted by the late reporter, and this report has been furnished by him.

In the Circuit Court of the county of Washington, James Ash, a negro, presented a petition, stating that he was entitled to his freedom, and that he is held in custody and confined in the private jail of William H. Williams. He prayed a subpœna to James H. Williams, and that he may have a fair trial on his petition.

Mr. Williams appeared to the subpœna, and denied the title of the petitioner to his freedom.

Issue was joined on the pleadings, and the jury found a verdict for the petitioner, and that he was free and discharged from the service of Williams.

To the opinion of the court on the trial, a bill of exceptions was tendered by the counsel for Mr. Williams. The bill of exceptions stated, that on the trial the defendant produced, and gave in evidence to the jury, the last will and testament of Maria Ann T. Greenfield; and it was admitted that the said testatrix died at the county of Prince George's, in the state of Maryland, soon after the date of said will, in the year 1824; that upon her death, Gerard T. Greenfield, the executor named in the will, duly proved the same in the Orphans' Court of said county, where the slaves and property left by the testatrix were, and took letters testamentary as such executor.

The petitioner is one of the slaves named and demised in that clause of the will, which is in the words following, to wit:

"I also give and bequeath to my nephew, Gerard T. Greenfield, all my negro slaves, namely: Ben, Mason, James Ash, Henry, George, Lewis, Rebecca, Kitty, Sophia, Mary Elizabeth, Nathaniel and Maria; also, Tony, Billy, Betty, and Anne, provided he shall not carry them out of the state of Maryland, or sell them to any one; in either of which events, I will and desire the said negroes to be free for life."

The petitioner was a slave born, and the property of the testatrix at the time of her death; that the said G. T. Greenfield, upon the death of said testatrix, took possession of the petitioner and the other slaves devised to him, and held the same as his slaves so devised to him, from that time till the 18th day of December last, when, before the institution of this suit he sold the petitioner to the defendant: that G. T. Greenfield at the time of the date of said will, and ever since, resided in the state of Ten-

nessee, with an interval of between two and three years, that he sojourned after the death of the testatrix, in Prince George's county, for the purpose of settling his business. Thereupon the court was of opinion, and instructed the jury, that by the fact of such sale of the petitioner the estate or property in the petitioner so devised to said G. T. Greenfield ceased and determined; and the petitioner thereupon became entitled to freedom as claimed in his said petition: to which opinion and instruction of the court, the defendant by his counsel excepted.

Judgment was rendered for the plaintiff, and the defendant prosecuted this writ of error.

Marbury, for the plaintiff in error.

Bradley, for the defendant.

Marbury contended, that as to the first question presented on the bill of exceptions, whether Mr. Greenfield took an absolute estate, by the terms of the will, in the property bequeathed to him. A devise of personal estate in general terms, without words of limitation, vests in the legatee the absolute property in the thing bequeathed. If a testator says, "I give all my personal estate to A. B.," without other words, A. B. will take the absolute estate in all the personal property of which the testator may die possessed.

The language of the will, in the case before the court, is as general, comprehensive, and effective, for the purpose of passing the whole estate, as language can be; and gives to the legatee the whole estate, subject only to the restriction of the right of alienation.

There is here no limitation of the estate—no intention expressed to confine the legatee to an estate for life in the slaves, or to give him a mere personal benefit by the bequest.

Admitting the validity of the restriction, if he should neither remove the negroes or sell them, at his death they will go to his representatives, to be distributed among his next of kin, if he should die intestate; and to his legatee, if he should make a testamentary bequest.

It has been suggested that this very restriction will operate to limit the legatee to an estate for life; that it shows that it was not intended he should have the absolute power and control over the negroes. But a restriction on the right to sell never has been

construed into a limitation of the estate of the devisee, when the language of the will passed the fee.

The proviso is a restriction on the right of alienation. The property is given to the legatee absolutely, with a condition annexed, that he shall not sell; a condition which is repugnant to the nature of the estate, and therefore void. Co. Lit. 206 b, 223 a.

If there be a limitation over, on the breach of such condition, it does not alter the case. The condition itself being void, the estate limited upon it must be void also.

What is a conditional limitation, but an estate which is to vest on a certain condition, or the happening of a certain event, by which a preceding estate is to be divested? If, then, the condition on which the preceding estate is to be divested, be unlawful and repugnant, and therefore void, the preceding estate cannot be divested; can a man be deprived of his estate by refusing to do an unlawful thing, or by doing that which the law authorizes him to do with his own? Bradley *v.* Peixoto, 3 Vesey, 324; 2 Caines's Reports, 348.

It will be contended, on the part of the defendant in error, that there is something in the nature of the property which is the subject of this devise, that requires the application of a rule of law different from that which would be applied to a case arising on the title or ownership to any other kind of property.

Negroes, by the laws of Maryland, are property precisely as money in the funds, or household effects. The *jus disponendi* in the master is as absolute in the one case as in the other. How shall the court decide in favour of the freedom of the slave, without at the same time, and in the same judgment, deciding the right of property, as claimed? Mima Queen *v.* Hepburn, 7 Cranch, 295.

If, on the breach of the condition not to sell, the testatrix had given the property in the negroes to a third person, the limitation over would have been declared void; because such a restriction would be on a condition repugnant and void.

But here is a bequest of freedom, on the same repugnant conclusion. How is it to take effect, without denying to the master that control over the negroes which he is by law entitled to exercise over them, and which he might exercise over any other

property in like circumstances, without subjecting himself to a forfeiture.

There is a class of cases in which it has been held that a testator may restrain the alienation of the interest given by the will, and limit the estate over in the case of alienation, whether voluntary or involuntary. This class of cases originated in the case of Dommett *v.* Bedford, 3 Vesey, 149. The principle of this case has become a general rule of law, in the following cases: 13 Vesey, 404, 429; 3 Swanston, 505; 5 Mod. 515; 6 Maddox, 482.

In this class of cases, the estate is vested in trustees; and it is provided that the interest or income shall be received by the trustees, and a certain portion thereof be paid at certain periods to the legatees, unless they become bankrupts, or make voluntary assignments of the amounts respectively settled in said cases; whereupon, in each case, the annuity is to cease, and the estate is devised over. Such bequests are held to be short of a life-estate, and to be intended for the mere personal benefit of the legatee.

The cases belonging to this class differ materially from that under consideration. In them the title to the estate is in trustees; in the legatee of the annuity, there is nothing but a right to receive payment of a sum of money, until the happening of a given event—his becoming bankrupt, or voluntarily parting with the right to receive it. The annuitant takes only a life-estate—the gift was merely for his personal benefit.

By the will in this case the legatee took to himself the absolute property in the negroes bequeathed. The enjoyment of them is not limited to a mere personal benefit. The property does not cease at his death, but will pass to his representatives, to be disposed of, or distributed according to law.

Bradley, for the defendant.

This is a will. The intention of the testatrix to be gathered from all the parts of the will, is to be effected, if it can be, without contravening some settled principle of law. Smith *v.* Bell, 2 Peters, 75, and the cases cited.

What estate did Gerard take? What effect had the exportation and sale?

There are two bequests, one of property in the slaves, to Ge-

rard, supposed to be absolute; another of freedom to the slaves, upon the happening of either of two events, defeating the first devise, and therefore limiting it. If these events are repugnant to the devise to Gerard, does that prevent their happening? If they happen, must they not give rise to the devise over?

The intent of the testatrix is clear. She meant to give Gerard a qualified, not an absolute estate, and to limit it to the happening of the event she has prescribed.

The bequest of freedom is not a condition annexed to the estate of Gerard; it is a conditional limitation of that estate, contingent until the event occurs, but becoming absolute so soon as that has happened. Preston on Est's. 40; Fearn. on Remain. 11, 14, 16.

It might be void as a bare condition, as to Gerard; yet good as a limitation, as to the slaves.

She meant to give to the slaves a higher and nobler bequest. What is it? Property? The same interest she had given to Gerard? The same estate or power? If so, how is it to be estimated? By what law to be controlled?

Freedom is not to be valued. Lee *v.* Lee, 8 Peters, 48. A question of freedom is superior to any question of property. Allen *v.* Wallingsford, 10 Peters, 583. It is a question deserving the favour of courts. Fenwick *v.* Chapman, 9 Peters, 476. Isaacs *v.* Randolph's Executors, 6 Rand. 652.

In construing the will, we must look to the subject-matter of both devises. The first relates to property, the second to freedom, and yet both relate to the same subject. And what is it? Is it merely property? They are slaves; but they are human beings. They may acquire freedom by implication. Mullen *v.* Hall, 5 Harris and Johns. 190; Legrand *v.* Darnell, 2 Peters, 664. They are recognised as persons in the Constitution of the United States, art. 1, sect. 9, par. 1; sect. 2, part 3; art. 4, sect. 2, par. 3. They are so recognised by courts of justice. The law of common carriers does not apply to them. Boyce *v.* Anderson, 2 Peters, 155. Humanity forbids the separation of mothers from infant children, and the court will not sanction it. Fitzhugh and wife *v.* Foote and others, 3 Call. 13.

If, then, the character of the bequest over be different from that given to Gerard—superior to property—not to be valued—

deserving the favour of the courts, of a wholly different nature; and the intent of the testatrix in regard to this bequest over be clear, shall that intent be defeated by rules adopted solely for the regulation of property? Is there any precedent controlling this court?

It is conceded she might have given to Gerard a life-estate, and freedom to the slaves upon his death. She could then certainly have granted a less estate, and have made this to depend upon a certain or uncertain event. Then it is immaterial how this event is brought about, by the act of Gerard, or operation of law.

She might have given a life-estate in the usufruct, to be terminated by his aliening during his life, and remainder to the slaves. Dommett *v.* Bedford, 6 T. R. 684; Brandon *v.* Robinson, 18 Vesey, 429; Yarnold *v.* Morehouse, 1 Russ. and Mylne, 364; Legget *v.* Lear, 2 Sim. 479; 4 Russ. and Mylne, 690.

Did she intend to give Gerard during his life any thing more than the usufruct?

If she has so expressed herself, that this restraint upon alienation amounts to a limitation of the previous estate, and there is a devise over, it is not necessarily so repugnant as to be void, but may be carried into effect. Wilkinson *v.* Wilkinson, 3 Swan. 515; Coop. C. C. 259; 2 Wils. C. C. 47.

She has so expressed herself, and it was her clear intent. Besides, upon this question of intent, we must look to the relation of the parties. The first taker is her nephew. She meant to aid him, but it must be in her own manner, by his taking a qualified estate to be held in Maryland. The others are her slaves, grown up around her, to whom she is attached—for whom she intends, as far as possible, to provide protection. She knows the laws, climate, customs under which they have been protected, and grown—she does not know whither they may be carried. She leaves them to the charge of this nephew, *submodo*, qualifying and restraining his power over them. There is a great primary intent pervading the whole will, an intent controlling the rights conferred on Gerard, and that is the protection and preservation of these objects of her bounty, in what she thinks the best condition for them. Is this intent opposed by any settled principle of law?

It is said the law in regard to slaves, and the rules of evidence in cases of freedom are the same as in all cases of personal property, and the case of Mima Queen, 7 Cranch, 290, is relied on as sustaining this position. We deny it. The whole point of that case is as to the admissibility of hearsay evidence to prove a specific fact. We agree that the rules of evidence are and must be the same, and we invoke the aid of that principle. We apply it to ascertain the intent of the testatrix.

But are the laws of personal property applicable? Upon what principle? Upon what adjudicated case? What laws? Shall we go to England? To her system of villanage, as it once existed, in the only part of her political or judicial frame which was ever supposed to bear the least analogy to this. Trace out the analogies and see how few they are. In what do they resemble each other? Even under that condition, such a case as this could never have arisen. We can get no aid from her jurisprudence.

Shall we go to the laws of the several states? Our search would be equally vain here. The right which is held in a slave is so modified by statutory provisions, by local causes, by custom, by the common law, by the social condition, and by the local and political position of each state, that we can derive no important aid from them. It is emphatically a subject of peculiar regulation. But wherever we do find the right to manumit, we find this cardinal point, that suits for freedom are to be favoured, pervading and controlling the judicial decisions.

The laws of personal property are not applicable.

Colour, in a slaveholding state is a badge of slavery. It is not so where slavery does not exist. Accompanied by possession in the former state, it is evidence of title. An adverse possession of a slave for a period corresponding with the statute of limitations gives title in a slave. Hardeson *v.* Hays, 4 Yerg. 507; Partee *v.* Badget, 4 Yerg. 174; Brent *v.* Chapman, 5 Cranch, 358; Shelby *v.* Guy, 11 Wheat. 361; Garth's Executors *v.* Barksdale, 5 Munf. 101; Carter *v.* Carter, 5 Munf. 108; Newby *v.* Blakey, 3 Hen. and Mun. 57; Smart *v.* Baugh, 3 J. J. Marsh. 363.

But no length of possession, however open, notorious, and absolute, can prevail against a claim of freedom, where the claimant can trace back his descent from a free maternal ancestor. Rawlings *v.* Boston, 3 Harris and McHen. 139; or if he can show

an acquired right to freedom, perfected in himself. Hunter *v.* Futener, 1 Leigh, 172, and cases cited. Burke *v.* Negro Joe, 6 Gill and Johns. 136.

By statutory provisions in Maryland, they are regarded as responsible and intellectual beings, as "persons" capable of contracting. In some cases they are entitled to trial by jury. Maryland Act, 1751, ch. 14, sect. 4. They may contract. 1715, ch. 44, sect. 11. They may discharge the very responsible office of pilots. 1788, ch. 33.

If, then, the laws of personal property apply, to what extent do they so apply?

Considered merely as personal property, they are subject to all the laws regulating that species of property; they may be the subject of contract, pass by gift or will, descend, or be taken in execution. Their gains belong to their owner; they can make no contract with third parties, without the owner's assent, and none with their owner, and the issue of the woman is part of the use, the property of the person to whom the mother belongs, for the time being. 1 Har. and McH. 160, 352; 1 Har. and Johns. 526; 6 Har. and Johns. 16, 526.

Considered as human beings capable of acquiring, under the laws, rights paramount to all individual claims, and to be controlled only by the sovereign in the state, from the exercise of which they have been rightfully debarred by law, they acquire a higher dignity.

In their former character they are to be considered as property. But here the very question is, *are they property?* To determine this, shall we assume that the laws of property apply, and by those laws determine their character, and a right immeasurably above them? Can property take property? Can a man be indicted for *murder* of property? Can property be entitled to a trial by jury, or commit a crime, or acquire a right? Yet all this may be done by a negro; and they all imply a reasoning faculty, a conscience, an immortal spirit, in which there can be no property.

We must look to the laws of Maryland. The statutes there give them power to take freedom by devise, to take effect immediately, or at a remote period, after a term of years or a life-estate. Act 1796 and 1809. The decisions of the courts of Maryland are in favour of this capacity. The statutes direct two

modes of emancipation; by will or deed. The courts have extended it to implied manumission, as in Dolly Mullens case, and to adverse possession or length of time, as in Negro Joe *v.* Burke.

Where, then, the intent of the testator clearly appears to secure to them liberty on the happening of an event, which has happened; or where a doubtful form of expression is used, which, in regard to mere personal property, might amount to a condition repugnant to the bequest, and thus be void, yet in favour of liberty, and having a regard to the subject of the bequest and the right intended to be conferred, the court will construe the will according to the intent, and take this to be a limitation of the estate.

Again. The intent of the testatrix is to give freedom to the slaves, unless they can be held in Maryland upon the terms she has herself declared. Now if they cannot be so held in slavery, what is to be the effect? They are free.

Again. It has been said that restraint upon alienation is void. Yet in an executory devise this restraint exists, and has never been disputed. Moffat *v.* Strong, 10 Johns. 12, Cordle *v.* Cordle, 6 Munf. 455.

But, it is said, if the devise of freedom is to depend upon the happening of the event mentioned in the will, the first estate must vest, and then the condition is void. Not so. It does not necessarily follow. Stainham and Bell, Lofft. 455; Avelyn *v.* Ward, 1 Ves. sen. 420; in which last case the court says, if by any means the conditional limitation is removed, the devise over will take effect. See also Simpson *v.* Vickers, 14 Ves. 341, and particularly Doe ex dem. Smith *v.* Hance, 6 Halsted, 244, 252—254.

Suppose the estate of Gerard to have vested. What was its extent and limitation? It was not intended to be absolute. The power to give or prevent freedom was not devised to him. That was already exercised. He had a qualified property. Slavery is the property which one man has in the labour of another, and the right to the custody and such limited use of the person of that other, as the particular laws allow. The power of the master is subordinate to the law of the land, and in some cases he is allowed by that law to give freedom in Maryland *in presenti* or *in futuro*. If the master once exercises this author-

ity, it is irrevocable, the subject of it can never be reduced again to the condition of a slave, unless by legislative provision.

Now if any right in, or power over a thing granted be reserved to the grantor, or devised to a third person, the person taking has but a qualified or limited estate, it is not absolute. The grantor or devisor may annex to this qualified or limited estate, conditions by which it may be terminated at a period short of that to which it would otherwise run. The effect must be to give rise, in case of a devise over to the new estate, if there be one devised, or the property must revert. It cannot be that the tenant of the particular estate shall have the power to defeat the other and usurp the whole property to himself. Is not this the case here?

Without the proviso, the words are as absolute as in the case of Smith *v.* Bell, 6 Peters, 74. But the proviso must operate to restrain the general words in the same manner as the devise over of the remainder in that case. She could grant a life-estate, with freedom to take effect at its expiration, the life-estate to be forfeited upon the happening of an event, and the devise over to take effect. *A fortiori* she might make this life-estate to depend upon his keeping them in his own possession and in the state of Maryland. The uncertainty of the event can make no difference. It has happened. The happening of the event is during a single life, and, therefore, not too remote. We maintain, then, that this is not a naked condition annexed to an absolute estate and repugnant to it, and therefore void, but is a contingent limitation of a particular estate, with a devise over of a faculty or estate of the highest dignity and most absolute character, to take effect on the happening of a contingent event by which the particular estate was to be terminated, which event must occur during the lifetime of a person in being, and the event has happened. As to the distinction between a naked condition, and a conditional limitation, see Taylor *v.* Mason, 9 Wheat. 329, &c., and particularly Smith *v.* Hance, 6 Halsted, 244, *et seq.*

But, is a condition in restraint of alienation necessarily void? and are there not cases where it amounts to a limitation? The true distinction is, that where such a condition amounts to a limitation of the precedent particular estate, with a devise over, it is good. Doe d. Duke Norfolk *v.* Hawke, 2 East, 481; and Wilkinson *v.* Wilkinson, 3 Swans. 515.

The reason of the rule is obvious, it is to prevent perpetuities, and therefore the *jus disponendi* in an absolute estate is not to be taken away, but even this may be qualified. Litt. sec. 361; Shep. Touch. 129; Gill *v.* Pearson, 6 East, 173; S. C. 2 Smith, 295. This last case is a clear case of a fee simple, with a condition terminating it. If the power of disposal is not absolutely taken away, the condition restraining it may be good. Jackson *v.* Shutz, 18 Johns. 175, and cases cited; McWilliams *v.* Nisby, 2 Serg. and Rawle, 507. Here he might at any time have disposed of his interest to the slaves themselves, by releasing it.

The case of Bradley *v.* Piexoto, as stated in the report, does not warrant the exposition of it in the opinion of the Master of the Rolls. We do not controvert his law, for if the gift was absolute of both principal and dividends, that case cannot illustrate this. If it was not absolute, the case is wholly inconsistent with Wilkinson *v.* Wilkinson; Branden *v.* Robinson; Dommett *v.* Bedford; Legget *v.* Lear, &c. already cited, and particularly Bird *v.* Hudson, 3 Swans. 342.

We are considering a will. The intent is to govern. Every intent is to be effected if possible. The primary intent is to prevail. The particular intent was to give the nephew a qualified estate. The primary intent was to afford protection and security to the slaves. The restraint upon the nephew does not take away all power of alienation. The execution of every intent does not contravene any settled principle of law. The event to determine the estate of the first taker is not too remote.

Besides it is a case in favour of liberty, to be attained by the instruments, and in the mode pointed out by the statutes, a case involving one interest of the highest dignity, and depending on the happening of an event to terminate another interest of less importance.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case is brought here by writ of error, from the Circuit Court of the District of Columbia, for Washington county, and came before that court upon a petition for freedom.

It appeared on the trial, that the petitioner was the property of Mary Ann T. Greenfield, of Prince George's county, in the state of Maryland, who died in 1824, having first duly made her

last will and testament, whereby among other things she bequeathed the petitioner, with sundry other slaves, to her nephew, Gerard T. Greenfield, with a proviso in the following words: "Provided he shall not carry them out of the state of Maryland, or sell them to any one; in either of which events I will and devise the said negroes to be free for life," and she appointed her said nephew her executor.

Upon the death of the testatrix, Gerard T. Greenfield took possession of the petitioner and the other slaves bequeathed to him, and held them from that time until December, 1839, when he sold the petitioner to the defendant; and the petition for freedom was filed shortly after the sale. At the time of the making of the will, and ever since, Gerard T. Greenfield resided in the state of Tennessee; with an interval of between two and three years, during which he sojourned in Prince George's county, after the death of the testatrix, for the purpose of settling his business.

Upon this evidence, the Circuit Court instructed the jury, that by the fact of such sale of the petitioner, the estate or property in the petitioner so bequeathed to Greenfield, ceased and determined, and he therefore became entitled to his freedom.

Under this direction of the court, the verdict was in favour of the petitioner.

By the laws of Maryland, as they stood at the date of this will, and at the time of the death of the testatrix, any person might, by deed, or last will and testament, declare his slave to be free after any given period of service, or at any particular age, or upon the performance of any condition, or on the event of any contingency.

This right is recognised in the act of Assembly, of 1809, ch. 171.

The contingency upon which the petitioner was to become free must, by the terms of the will, have happened in the lifetime of Gerard T. Greenfield; and if he had died without selling him, or conveying him out of the state of Maryland, the petitioner would have continued a slave for life. The event, therefore, upon which he was to become free was not too remote.

It is said, however, that this was a restraint on alienation inconsistent with the right of property bequeathed by the will. But if, instead of giving freedom to the slave, he had been bequeathed to some third person, in the event of his being sold, or

removed out of the estate by the first taker, it is evident upon common law principles, that the limitation over would have been good. 2 East, 481. Now a bequest of freedom to the slave stands upon the same principles with a bequest over to a third person. It is said by the chancellor of Maryland, 2 Bland's Chancery Rep. 314, that the bequest of freedom to a slave is a specific legacy, and undoubtedly this is its true legal character.

And if a bequest over to a third person would not be regarded as an unlawful restraint upon alienation, there can be no reason for applying a different rule where the bequest over is freedom to the slave. In the one case, the restriction on alienation ceases as soon as the devise over takes effect; and in the other, the right of property ceases upon the happening of the contingency, and there is nothing to alien.

We think that the bequest in the will was a conditional limitation of freedom to the petitioner, and that it took effect the moment he was sold. The judgment of the Circuit Court must therefore be affirmed.

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*George W. Hammond, Administrator de bonis non of Thomas Hammond, deceased, and others, Appellants, v. Lorenzo Lewis, Executor of Lawrence Lewis, deceased, who was the Acting Executor of Gen. George Washington, Appellee.

In the distribution of the estate of a deceased person, an assignment, to one of the distributees, of a mortgage which is for a greater sum than his distributive share, does not make him responsible to the executors for the difference between his share and the nominal amount of the mortgage, in case the mortgaged premises sell for less than the amount of his share, where the distributee has, with proper diligence, and in good faith, subjected the mortgaged property to sale, and has not bound himself absolutely for the nominal sum secured by the mortgage.

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* In the progress of the cause, G. W. Hammond also died, and his administratrix became a party; but the suit having been an amicable one, this did not delay the proceedings. It is mentioned only because sometimes the one and sometimes the other is spoken of as the person interested.

THIS was an appeal from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Alexandria.

The facts in the case were these.

General Washington, by his will, executed in 1799, devised all the rest and residue of his estate, real and personal, not before disposed of by said will, to be sold by his executors, at such time, in such manner, and on such credits, (if an equal, valid, and satisfactory distribution of the specific property could not be made without,) as in their judgment should be most conducive to the interest of the parties concerned; and the moneys arising therefrom to be divided into twenty-three equal parts.

On the 19th of July, 1802, the executors assembled the legatees, with a view to consult them upon certain questions arising under the will; and it was agreed that a certain portion of the personal estate should be sold, another portion divided, a certain portion of the lands divided, and the residue sold by the executors.

On the 6th of June, 1803, a meeting of the devisees was held, at which it was agreed that certain lands, lying on the eastern waters, should be sold, and, if purchased by the devisees, such purchaser should pay at three equal annual instalments with six per cent. interest from the day of sale, but to be credited with his proportion of the sales which had there been made, and which were to be divided among the said devisees.

On the 7th of June, 1803, Burdett Ashton, who was entitled, in his own right, and that of his sister, to two-thirds of a distributive share, purchased from the executors property belonging to the estate, for the sum of $9410 20 cents; payable, one-third on demand, one-third on the 7th of June, 1805, and one-third on the 7th of June, 1806.

On the 12th of March, 1805, Ashton mortgaged to the executors three tracts of land in Jefferson county, Virginia, amounting in the whole to one thousand and seventy-six acres, to secure the payment of the purchase which he had made, as above stated.

On the 11th of March, 1806, the executors assigned the mortgage to Thomas Hammond, who was entitled to a full distributive share in right of his wife, and attached to the assignment the following memorandum. "The executors are not to be made personally liable, in any respect, or on any pretence,

wherein, for, or by reason of the above assignment, and further, the within named Burdett Ashton, Jr., his heirs, executors and administrators, is to have credit for his proportion of $5179 5 cents, being the share of each legatee of said George Washington, of certain sales of real and personal estate made by the said executors, as well as for the proportion of the sister of the said Burdett, as her attorney in fact."

As it was thought that the distributive shares of the said Ashton and Hammond, when added together, would not quite exhaust the debt due from Ashton to the executors, the latter took from Hammond, on the same day on which they made the assignment, a deed by way of mortgage, in which it was stipulated that Hammond should indemnify the executors, and also should pay to the executors whatever surplus might remain, after deducting Hammond's and Ashton's distributive shares from the amount of Ashton's debt to the executors.

On the 2d of April, 1806, Hammond, being indebted to Smith, Calhoun & Co., of the city of Baltimore, in the sum of $5604 64 cents, assigned to them all his right to so much of the mortgaged premises as would be sufficient to satisfy the sum aforesaid. As speedily as possible, Smith, Calhoun & Co., obtained a decree in the high Court of Chancery, in Virginia, to foreclose Ashton's mortgage, who, at the time of such foreclosure, was insolvent, and died so. The result of such sale is thus stated in the opinion of the Circuit Court, delivered in a subsequent stage of the cause.

The property mortgaged by Ashton, sold under decree for (nett proceeds) $3908 46.

The debt of Ashton was - - - - - - - - -	$9410 20
He had a right to retain - - - - - - - - -	3452 70
The real amount of Ashton's debt was - - -	$5957 50
Hammond's claim was - - - - - - - - - -	5179 05
Amount rec'd by Hammond's mort. to executors -	$778 45

At some period between 1819 and 1823, the executors addressed a circular letter to each of the legatees, who had by this time become very numerous, expressing a desire to close their executorial duties, and stating that a difficulty existed in the mode of calculating interest. They say, "there are but two

modes by which our objects can be attained—a reference of the accounts to arbitration, or a suit; the former we should prefer, as most consonant with the injunction of our testator, if it were not attended by insuperable difficulties, on account of the dispersed situation of the legatees, who consequently could scarcely be expected to agree upon the arbitrators; we therefore propose that the legatees should concur in instituting an amicable suit in chancery against us, to which we will immediately file an answer, and obtain an order of reference to the master, to adjust and report the precise sum to which each legatee is entitled; which being done, we can proceed with safety to pay such sums as fast as the money comes to our hands."

In 1823, the legatees, in conformity with the above suggestion, filed a bill in the Circuit Court for the District of Columbia, which the executors immediately answered, admitting the existence of a balance to be distributed, and submitting to any decree which the court might think proper to pass. A special auditor was appointed to state the accounts of the parties.

In 1825, the executors filed a cross bill, alleging that all the parties were not in court, and praying that they might all be brought in. The proper proceedings were accordingly had as to the absentees, and in 1826 the Circuit Court passed a decree directing the sums to be paid to the several legatees, with the exception of the administratrix of Thomas Hammond and of Burdett Ashton. The auditor stated the account of Hammond upon two different principles; in one, giving him credit for $5178 68 cents, a distributive share, and charging him with $4006 24 cents, the gross amount of the proceeds of the mortgage sale; and bringing the executors in debt to Hammond upwards of $4000: in the other, giving him credit for the same sum, but charging him with the balance of the debt due by Ashton, bringing him in debt to the executors upwards of $2000. The Circuit Court adopted the latter, and decreed that the administratrix of Hammond should pay to the executors the sum of $2158 56 cents, with interest on $1127 27 cents, the principal sum due, from the 1st day of June, 1824.

From which decree, the administratrix appealed to this court.

Coxe, for the appellant.

Jones, for the appellees.

Mr. Justice DANIEL delivered the opinion of the court.

This is the case of an appeal from a decree of the Circuit Court of the United States, for the District of Columbia.

This suit was originally of an amicable character, and was instituted at the request of the executors of General George Washington, by the legatees under his will, with a view to a definitive settlement of the accounts of the executors and a distribution of the estate. Subsequently to its institution, a cross bill was filed by the executors for the purpose of covering some of the legatees, who had been omitted in the prior proceedings, and the two causes were prosecuted and decreed upon as one suit. The facts out of which the questions now presented for consideration have arisen, are substantially the following.

General Washington, after having disposed of a portion of his estate, devised all the residue of his real and personal property to be sold by his executors, if it could not be equally and satisfactorily divided, and directed the proceeds to be divided into twenty-three equal shares, and distributed by shares and parts of shares, amongst twenty-nine persons named, and others not named, but designated by a collective description. Amongst those having an interest in the estate was Mildred Hammond, the wife of Thomas Hammond, in whose right the appellant claims one share of the twenty-third part of the residue. After a previous distribution by the executors of $7000, the amount arising from further sales, and remaining for distribution at the commencement of this suit, was near $120,000.

Several of the residuary legatees became purchasers at the sales made by the executors, some for more, others for less than their shares or parts of shares to which they were entitled. They gave securities for the amount of their purchases, as other purchasers would have been required to do, with an understanding that their several shares of the estate, when ascertained, should be credited against the sales respectively made to them.

Among those legatees who purchased to an amount exceeding their shares was Burdett Ashton, who was entitled to one-third of one share in his own right, and to one other third of a share in right of a sister, together equal to two-thirds of one-twenty-third or full share of the residuum subject to distribution. This interest of Ashton was subsequently ascertained to be $3425 20

cents. He purchased property in June, 1803, to the amount of $9410 20 cents, payable in three annual instalments; and for securing this debt, with interest from the date, executed to the executors a mortgage on the 12th day of March, 1805.

Thomas Hammond (the husband of the legatee, Mildred Hammond) obtained from the executors an assignment of the mortgage from Ashton for the $9410 20 cents, and executed to them an obligation to account for any surplus which he might receive from Ashton's mortgage, beyond the share of Mildred Hammond, amounting to $5179 50 cents after crediting Ashton with two-thirds of a share to which he was entitled. The consideration for the assignment to Hammond is stated to be "one dollar in hand paid, but principally on account" of the share of his wife in the residue of General Washington's estate; and they bargain, sell, and assign to the said Hammond, his heirs, &c., all the right, title, interest, estate, claim, and demand of the executors to the within-mentioned land and premises, and to the deed within mentioned. At the foot of the assignment is a memorandum, "that the executors are not to be personally liable in any respect, or on any pretence, for or by reason of the above assignment," and further, "that the within named Burdett Ashton, his heirs, &c., shall have credit for his proportion, and for the proportion of his sister," in one share of the residuum of the estate, &c.

Within less than a month after receiving an assignment from the executors, Hammond assigned Ashton's mortgage to Smith, Buchanan and Calhoun, in consideration of a debt due from him to them. These last assignees filed their bill in the Supreme Court of Chancery in Virginia, to foreclose Ashton's mortgage, and to this bill the executors of Washington were made parties defendants. In their answer these executors admit the interests of Hammond and Ashton in the estate of their testator, the assignment by them to Hammond of Ashton's mortgage, and they ask nothing on their own account except this, that as certain funds of the estate upon the basis of which Ashton's proportion had in part been calculated, might turn out to be unavailable, he, Ashton, might be required to indemnify the executors against such a contingency.

The settlement of Ashton's account having been by the Court of Chancery referred to the master, a large balance was reported

tended to be secured by the mortgage, neither in relation to any full equivalent for it, received by Hammond, which should bind him for it *in toto*, nor in relation to any entire and absolute transfer of it by the executors; and this surely was the place in which such terms, or conditions, if they really belonged to the contract, should have been expressed. The view here presented is fortified by the instrument of indemnity executed by Hammond to the executors contemporaneously with the assignment by the latter to him of Ashton's mortgage. This instrument of indemnity, after reciting that the executors had assigned, &c., a deed due them from Ashton, specifying no sum, no debt *in numeris*; after reciting too that Ashton was entitled to a portion of the assets, proceeds thus: "And whereas it is supposed that the amount of the said debt due from Burdett Ashton, after making the discounts aforesaid, to which he may be entitled, will exceed the said sum of $5179 50 cents, due to the said Thomas Hammond, as agreed; for which excess, the said Thomas Hammond is willing to give security; now if the said Thomas Hammond shall well and truly pay, &c., such sum as the debt due from the said Burdett Ashton, shall exceed," &c. This portion of the instrument, beginning, "whereas it is supposed that the amount of the debt due from Ashton, after making the discounts to which he is entitled," &c. forcibly elucidates the meaning and objects of the parties to that contract. The amount of Hammond's interest in the estate, the amount too of Ashton's debt to the executors, and of the portion claimed in his own right, and in right of his sister, were all known. With regard to these, then, there was no uncertainty. The supposition, therefore, expressed in this instrument could have no applicability to matters thus ascertained; that supposition could have been designed to apply only to the contingency of the mortgage subject producing a sum greater than the distributive share of Hammond in the estate; in which event, he was to be responsible for the excess, and for nothing beyond it. This provision cannot be correctly interpreted as binding Hammond, however inadequate the mortgage subject might prove to meet his share of the assets, to carry into the estate and pay to the executors a sum he never had received, and which, from the nature of things, he could not possibly receive; in other words, to pay to these executors his own

money. Upon taking an assignment of Ashton's mortgage, Hammond was bound for good faith and ordinary diligence in prosecuting it. These obligations appear to have been fulfilled, for the executors who were made parties to the suit for foreclosure take no exception to any thing that had been done or omitted in reference to the security they had transferred.

This court, therefore, while it will not decree against the executors the difference between the proceeds of Ashton's mortgage and the distributive share of Hammond, as stated in the report of the master, is very clear that Hammond can upon no correct principle be held responsible to the executors for the difference between those same proceeds and the amount of the debt due from Ashton, which the mortgage was designed to secure; and that in decreeing against the administratrix of Hammond for that difference, the Circuit Court has committed an error for which its decree should be reversed.

This court doth accordingly reverse the decree of the Circuit Court, with costs, and remand this cause thereto, to be proceeded in conformably to the principles of this decision.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Alexandria, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court, in this cause, be and the same is hereby reversed with costs, and that this cause be and the same is hereby remanded to the said Circuit Court, with directions to proceed therein conformably to the opinion of this court.

THE UNITED STATES, APPELLANTS, *v.* DOMINGO ACOSTA, APPELLEE.

The certificate of the secretary of the Spanish governor of Florida is *prima facie* evidence of the existence of a grant of land.

The Spanish governor had authority to issue such a grant.

In the case of a grant made before the 24th of January, 1818, it is valid, although the survey was not made until after that day, provided the survey was made before the exchange of flags.

It is not a good objection to such a grant that the metes and bounds were not set forth.

THE facts in this case are fully set forth in the opinion of the court.

It was submitted by Mr. Legaré, the attorney-general, without argument, on the usual obiections assigned, *pro forma*, for error.

Mr. Justice CATRON delivered the opinion of the court.

This is an appeal from the decree of the Superior Court of East Florida, confirming eight thousand acres of land to Domingo Acosta, under the acts of Congress for the adjustment of land-claims in Florida.

The claim is founded on an alleged petition of Acosta, dated May 2, 1816, and a decree of Governor Coppinger thereon, dated the 20th day of the same month and year. The petition (record 8) sets forth: That by the certificates which he presented, signed by the commandants of Fernandina, who had governed it successively since 1808, his excellency would be informed that he had been a permanent resident of the said town, engaged all the while in commerce, and had served (in all that had offered itself) the wishes of the government for the good of the province; and that he had been particularly prompt with his person, his funds, and his influence, for the defence, the support, and the advancement of the town; and that he had at no time had any stipend, recompense, or remuneration, of his expenses, supplies, and losses, and had refrained from importuning the government with solicitations. He therefore prayed for a grant in property, of eight thousand acres; but as he was ignorant of the lands that were vacant, and desirous to avoid interference and dissensions with any person, he further prayed his excellency would be

pleased to grant them at the places where the surveyor-general might survey them as vacant lands!

The decree (record 8) states, that "in virtue of the certificates which this party presents, and it being the will of the sovereign that the merits of his subjects should be rewarded, the lands solicited in this instance are granted, with special charge to the surveyor-general to survey them to him without injury to third persons."

The originals of the petition and decree were not produced in evidence, neither are they to be found in the archives at St. Augustine. A certified copy, dated 24th June, 1816, under the hand of Thomas de Aguilar, secretary of the government, stated to be faithfully drawn from the original in his office, was alone offered, and was objected to on the part of the appellants.

The appellee also offered the following plats and certificates of survey, purporting to be made by George J. F. Clarke, surveyor-general of the province:

No. 1. Dated 12th January, 1818, for one thousand acres of land, on Bowlegs' old plantation, and situated northwardly and contiguous to the same Bowlegs' prairie, westward of Payneston.

No. 2. Dated 15th January, 1818, for one thousand five hundred acres of land, in the hammock called Jobbin's hammock, southwestwardly of the road called Ray's trail, leading from the natural bridge of the Santa Fe, to the point of Alachua called Hogtown.

No. 3. Dated 14th February, 1818, for one thousand five hundred acres of land, northward of Dunn's creek, running from Dunn's lake to the river St. John.

No. 4. Dated 20th January, 1820, for four thousand acres of land, on the west side of Indian river, and at a place called Flounder creek.

After hearing testimony as to the manner in which muniments of title were kept in the archives at St. Augustine, the court made a decree confirming the four several tracts of land to the claimant, from which decree the present appeal is taken.

On the part of the United States, it was contended that the said decree ought to be reversed, on the following grounds:

1. That there is not sufficient evidence to show that Governor Coppinger ever made the alleged concession or grant.

2. That if Governor Coppinger made such a grant, it was made without authority.

3. That there is no description whatever in the said pretended grant, of the lands alleged to be granted, and no valid survey could be made so as to sever any lands from the public domain.

4. That there is no evidence of the surveys.

The foregoing statement, offered on part of the United States, presents the facts of the case; and the objections to the decree below.

In answer to the first, that there is not sufficient evidence the grant was made, we refer to the case of Wiggins, (14 Peters,) which determines that the official certificates of the secretary Aguilar was *prima facie* proof of the existence of the original grant at the date when the copy was made; and of its contents.

In this case, Alveraz proves the certificate of the secretary genuine, and that he was in office at the date of the certificate. It was in proof that no original could be found in the proper office where it should be on file. This was sufficient to let in a copy; and there being no proof to contradict, or impair the force of Aguilar's certificate, the court below properly held, that the grant had been made by Governor Coppinger.

To the second objection, it is sufficient to say—that the governor, as the king's deputy, was the sole judge of the merits on which the claim is founded, and had undoubted power to reward the merits of the grantee; so this court has held in many cases.

3. Although there is no description of any place where the land granted shall be located, in the governor's decree; still it was binding so far as it went. The surveyor-general was ordered to survey the lands solicited, on places vacant, and without injury to third persons. The acts of this subordinate officer came in aid of the decree; he had the authority conferred to sever the land granted from the public domain: had he done so before the 24th of January, 1818, then there could be no doubt the grantee took title to the particular lands; because, up to this date, all grants made by the King of Spain, in whatever form, are recognised as valid by the article of the treaty. The difficulty in this case is, that two of the surveys were made after the 24th of January, 1818: and, did the grant take effect from the date of the surveys, then, by the stipulations of the 8th article,

it would be void. This question was first presented in Sibbald's case, 10 Peters, 321. It was thought by this court, that the 8th article of the treaty operated on grants made by the governor after the 24th of January, 1818, but not on the subordinate acts of the surveyor in giving effect to the grant; and that surveys could be made at any time before the change of flags between this government and that of Spain. Still, had that officer failed to make the surveys, the grant would not be binding on this government. We followed the case of Sibbald in that of Clarke *v.* Atkinson, at the last term, 16 Peters, 231. This construction was given to the 8th article of the treaty, in a spirit of liberality to this description of claimants, who could not be held justly responsible for the delays of the surveyor-general; and because the incipient claim, by the governor's decree, was not cut off by the treaty. The surveyor-general having executed the governor's decree, we are of opinion that the surveys made after the 24th of January, 1818, as well as those made before that date, are valid. That there are several surveys is no objection to their validity; the decree in this case obviously so contemplated.

4. It is objected, that no sufficient evidence is furnished by the record that the surveys were made. The cause was first submitted to the court below, in 1834; then the two surveys last made were objected to and admitted by the court. The judge continued the cause on his own motion for further proofs, and it stood over on continuances until 1840, when the four surveys were read without objection. We think the proofs authorized the decree, and order that it be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Superior Court for the District of East Florida, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Superior Court in this cause be and the same is hereby affirmed, in all respects.

JOSEPH W. WALSH, ADMINISTRATOR OF WILLIAM RECTOR, DECEASED, *v.* THE UNITED STATES.

THIS case came up, by writ of error, from the Circuit Court of the United States, for the district of Missouri.

On the motion of the attorney-general, of counsel for the defendant in error in this cause, the plaintiff in error having been three times solemnly called by the marshal to come into court and prosecute this writ of error and failing to do so: It is thereupon now here considered, ordered, and adjudged, by this court, that this writ of error to the Circuit Court of the United States, for the district of Missouri, be and the same is hereby dismissed.

WALTER SMITH, JOHN CARTER, WILLIAM S. NICHOLLS AND OTHERS, SURVIVORS OF CLEMENT SMITH, DECEASED, PLAINTIFFS IN ERROR, *v.* DENNIS CONDRY.

When a collision of vessels occurs in an English port, the rights of the parties depend upon the provisions of the British statutes then in force; and if doubts exist as to their true construction, this court will adopt that which is sanctioned by their own courts.

By the English statutes as interpreted in their courts, the master or owner of a vessel, trading to or from the port of Liverpool, is not answerable for damages occasioned by the fault of the pilot.

The actual damage sustained by the party at the time and place of injury, and not probable profits at the port of destination, ought to be the measure of value in damages, in cases of collision as well as in cases of insurance.

By whose fault the accident happened, is a question of fact for the jury, to be decided by them upon the whole of the evidence.

THIS case came up, by writ of error, from the Circuit Court of the United States, for the District of Columbia, and was argued at January term, 1842. The court held it under a *curia advisare vult*, and pronounced their decision at the present term.

The facts in the case were these.

The plaintiffs in error, who were also plaintiffs in the court below, were the owners of a vessel called the Francis Depau,

which was lying in the port of Liverpool, on the 15th of February, 1838, loaded and ready for sea. The barque Tasso, owned by the defendant, in coming out of the docks, ran foul of the Francis Depau and occasioned considerable damage. A suit was brought in consequence, and upon the trial the verdict of the jury was for the defendant. The following bills of exception were taken by the plaintiffs, upon which the case was brought up.

Plaintiffs' first bill of exceptions:

In the progress of this cause, the plaintiffs having offered evidence to prove that on the 15th of February, 1838, the barque Tasso, the property of defendant, in coming out of the dock at Liverpool, on her way to sea in the prosecution of her homeward voyage to the United States, ran foul of and occasioned damage to the Francis Depau, a ship belonging to plaintiffs, and inflicted damage and injury upon the vessel of the said plaintiffs; and having further given evidence tending to prove that said collision was the result of unskilful management on the part of the Tasso.

The defendant gave in evidence the statutes of 37 Geo. 3, c. 78; 52 Geo. 3, c. 39, and 6 Geo. 4, c. 125; and further proved that there was on board the Tasso, at the time of her moving from the dock and until after said collision, a regularly licensed pilot of said port of Liverpool; that the said vessel was under the management and direction of said pilot, and that the directions and orders of said pilot were followed and obeyed on board said vessel, the Tasso; that the master of the Tasso was not on board her during the time of her moving from said dock into the river; and that such absence of the master was usual and customary on such occasions.

The defendant upon said evidence prayed the court to instruct the jury, that by the true construction of the statutes of Great Britain, 37 Geo. 3, c. 78; 52 Geo. 3, c. 39, and the 6 Geo. 4, c. 125, produced on the trial, the defendant is not responsible to the plaintiffs in this action for any damage occasioned by the default, negligence, or unskilfulness of the pilot proved to have been on board the Tasso; which opinion the court gave as prayed, to which the plaintiffs, by their counsel, excepted.

Plaintiffs' second bill of exceptions.

In the trial of this cause the plaintiffs produced a competent witness, and offered to prove that the ship of the plaintiff, mentioned in the declaration, at the time of the injury complained of, was loaded with salt and ready to sail for the Georgetown market, and that if the ship had then sailed she would in due course have arrived in Georgetown (as was intended when her lading was taken in) in due time for the sale of the cargo at the fishing season of the Potomac river, when there is a great demand for salt; and that the loss occasioned by the injury in the delay of the vessel, preventing her arrival till after the fishing season, as she was compelled to unload and take in another cargo of salt, amounted to between 10 and 11 cents per bushel, making the loss in the whole cargo $2101 20, and contended that they should be allowed to give this evidence and to recover damages for the said loss, estimating the salt by the price at Georgetown in the fishing season when the vessel would have arrived.

But the court refused to allow the said evidence to be given by the plaintiffs, to which the plaintiffs, by their counsel, excepted.

Plaintiffs' third bill of exceptions.

And the plaintiffs having, after the foregoing evidence, farther offered evidence to prove that it is the usage of vessels coming out of the docks of Liverpool into the river to have their anchors slung in a tackle ready to be thrust over the bows, and in a situation to be dropped immediately on passing through the lock connecting the lock with the basin, and before passing from the latter into the river; that the anchor was not put over the bow nor attempted to be so done in the present case, on board the Tasso, until this vessel had passed into the river and was approaching the Francis Depau; and the defendant having offered in evidence the deposition of Frederick Lewis to prove that the Tasso, in passing from the basin through the piers thereof into the river had the said vessel in check by a hawser extending therefrom to one of the said piers, which hawser parted as the vessel cleared the pier head, and that the fish pennant or tackle suspending the anchors of said vessel broke in the attempt to get them over the bow of the vessel as aforesaid, and they thereupon fell upon the deck of the vessel; and the plaintiffs having further offered evidence by the pilot of the Francis Depau, to prove that defendant's

vessel appeared badly furnished, and that the mate thereof (the master being absent) at the time, declared that he had not a rope on board fit to hang a cat.

And in a further trial of this cause, the plaintiffs, after the depositions for the plaintiffs' and defendant were read, having offered evidence to show that in the management of a vessel when the fish tackle breaks, and it is important that the anchor should be thrown out, that it ought to be and can be accomplished in a short time by fixing another rope by a strop to the anchor and heaving it over the bows, and that such new fixture can be applied in a minute or two.

And the defendant having offered the following prayer—

"That if the jury shall believe from the evidence that the collision between the Tasso and the Francis Depau was occasioned by the breaking of her hawser and fish tackle, yet, from the said facts, the jury are not warranted in inferring that the said vessel, the Tasso, at the time of her sailing, was unseaworthy,"

The court gave the instruction as prayed, to which the plaintiffs, by their counsel, excepted. And the plaintiffs then prayed the court to instruct the jury, that if they believe from the evidence that the collision took place as above stated, then such breaking of the said hawser and tackle is no excuse for the collision on the part of the defendants; which the court refused, to which refusal also the plaintiffs excepted.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case arises from a collision in the port of Liverpool, between the barque Tasso, and the ship Francis Depau, in which the latter sustained considerable injury. The vessels were both American; the Francis Depau being owned by the plaintiffs in error, and the Tasso by the defendant.

It appears from the evidence, that at the time the accident happened, the Tasso was in charge of a regular pilot, leaving the Prince's dock on her homeward voyage; and the Francis Depau was at anchor in the harbour, laden with salt, and ready to sail. And in order to prove that the injury arose from the unskilful management of the Tasso, the plaintiffs offered in evidence that it is the usage of vessels coming out of the docks of Liverpool into the river, to have their anchors slung in tackle, ready to be

thrust over the bows, and in a situation to be dropped immediately on passing through the lock which connects the dock with the basin, and before passing from the latter into the river; and that the anchor of the Tasso was not put over the bow, nor was it attempted to be done, until she had passed into the river, and was approaching the Francis Depau.

The defendant then offered testimony to show that in passing from the basin, between the piers into the river, the Tasso was held in check by a hawser fastened to one of the piers, but that the hawser broke just as the vessel cleared the pier head; and the pilot perceiving that she was approaching the plaintiffs' ship, thereupon gave orders to get an anchor ready. The anchors were accordingly fixed as soon as possible, in the manner that is customary in going out of the port; and an attempt was made to get one of them over the side, but the tackle broke, and both anchors fell on deck, and the vessel struck the Francis Depau, and thereby occasioned the injury for which this suit is brought; that every thing was done on board the Tasso, according to the directions of the pilot, and every effort made to prevent the collision; but that it was blowing fresh, and the tide setting towards the plaintiffs' ship, and the Tasso would not mind her helm.

To rebut this testimony, the plaintiff offered in evidence, by the pilot, that the defendant's vessel appeared to be badly furnished, and that at the time the accident happened, the mate who had charge of her under the pilot, (the master being absent,) declared that he had not a rope on board fit to hang a cat; and further offered in evidence, that where the fish tackle breaks, and it is important that the anchor should be thrown out, it can be accomplished in a minute or two, by fixing another rope by a strop to the anchor, and heaving it over the bows.

At the trial, several exceptions were taken by the plaintiffs to different instructions given by the court to the jury; and the verdict and judgment in the Circuit Court having been in favour of the defendant, the case has been brought here for revision by a writ of error sued out by the plaintiffs. We proceed to examine the directions excepted to, in the order in which they appear in the record.

Upon the evidence above stated, the defendant asked the court to instruct the jury that under the statutes of Great Britain, of

the 37 Geo. 3, c. 78; 52 Geo. 3, c. 39, and 6th of Geo. 4, c. 125, the defendant was not responsible for any damage occasioned by the default, negligence, or unskilfulness of the pilot. The court gave this instruction, and that is the subject of the first exception.

The collision having taken place in the port of Liverpool, the rights of the parties depend upon the provisions of the British statutes, then in force; and if doubts exist as to their true construction, we must of course adopt that which is sanctioned by their own courts.

The 52 Geo. 3, mentioned in this exception, is a general act for the regulation of pilots and pilotage, within the limits specified in the law, and requires the masters of vessels under a certain penalty to take a pilot, and provides that no owner or master shall be answerable for any loss or damage, nor be prevented from recovering on any contract of insurance, by reason of any default, or neglect on the part of the pilot. But this statute did not repeal the previous one of 37 Geo. 3, for the regulation of pilots conducting ships into and out of the port of Liverpool; and the last-mentioned law required the master to pay full pilotage to the first who should offer his services, whether he was employed or not. This act did not, however, impose any penalty for refusal; and contained no clause exempting the master and owner from liability for loss or damage arising from the default of the pilot, where one was taken on board.

Upon these acts of Parliament, the Court of King's Bench held, in the case of Caruthers *v.* Sydebotham, 4 Maule and Selw. 77, that the master or owner of a vessel trading to and from the port of Liverpool, was not answerable for damages occasioned by the fault of the pilot. But in the case of the Attorney-General *v.* Case, 3 Price, 302, the same question was discussed in the argument before the Court of Exchequer, and it appears to have been the opinion of that court, that the master and owner were liable in the same manner as if the pilot had not been on board.

The question, it is true, did not necessarily arise in the last-mentioned case, for the vessel was at anchor in the river Mersey when the disaster happened; and a vessel at anchor was not bound to have a pilot on board. If in that situation the master thought proper to employ one, the pilot was undoubtedly his agent, and consequently he was responsible for his acts. But in

deciding the case, the court expressed their opinions on the two statutes of Geo. 3, before mentioned, in cases where pilots were required to be on board; and held that the provisions of the 52 Geo. 3, exempting masters and owners from liability, did not extend to cases embraced by the local pilot act for Liverpool; and strongly intimated that there was a distinction between the obligation to take a pilot under a penalty, and the obligation to pay full pilotage to the first that offered, whether he was taken or not.

Since these decisions were made in the King's Bench and Exchequer, the 37th Geo. 3 has been repealed by the 5th of Geo. 4, and the 52 Geo. 3 has been repealed by the general pilot act of the 6th of Geo. 4; and these two statutes of Geo. 4 were the laws in force at the time of the collision in question. But although some changes were made in the Liverpool pilot act in the first-mentioned statute, and in the general pilot law by the second, yet in regard to the subject now under consideration, these two statutes are the same in substance with the preceding ones which they respectively repealed; and the adjudged cases above mentioned apply with the same force to the question before us, as if they had been made since the passage of the acts of Geo. 4.

In determining, however, the true construction of these acts of Parliament, we are not left to decide between the conflicting opinions of the King's Bench and Court of Exchequer. The same question has since, on more than one occasion, arisen in the British Court of Admiralty, and the decision in the King's Bench has been constantly sustained; and we presume it is now regarded as the settled construction of these pilot acts. Abb. on Ship. (Shee's edition,) 184, n. z; The Maria, 1 Rob. New Admiralty Reports, 95; The Protector, 1 Rob. New Adm. Rep. 45; The Diana, 1 Rob. New Adm. Rep. We think, therefore, that the Circuit Court was right in the first instruction given to the jury.

The second also is free from objection. The question there was as to the rule of damages in case the plaintiffs should show themselves entitled to a verdict. They offered to prove that if the ship had not been prevented from sailing by the injury complained of, she would in due course have arrived in Georgetown (as was intended when the lading was taken in) in time for the sale of her cargo at the fishing season in the Potomac river, when

there is a great demand for salt; that the injury delayed her, and prevented her arrival until the season was over, and thereby made a difference of ten or eleven cents per bushel in the value of the salt at her home port, and occasioned a loss upon the cargo of $2101 20. The defendant objected to this testimony, and the court refused to admit it.

It has been repeatedly decided in cases of insurance, that the insured cannot recover for the loss of probable profits at the port of destination, and that the value of the goods at the place of shipment is the measure of compensation. There can be no good reason for establishing a different rule in cases of loss by collision. It is the actual damage sustained by the party at the time and place of the injury that is the measure of damages.

The third and last exception was taken to an instruction given upon the prayer of the defendant, and also to the refusal of the court to give a direction asked for by the plaintiffs. The defendant prayed the court to instruct the jury, that if they believed that the collision was occasioned by the breaking of the hawser and fish tackle, yet from those facts the jury were not warranted in inferring that the Tasso at the time of her sailing was unseaworthy; which direction the court gave. And thereupon the plaintiff prayed the court to instruct the jury, that if they believed the collision took place as above stated, then such breaking of the hawser and tackle is no excuse for it on the part of the defendant; and this direction the court refused to give.

Now these two prayers involve the same principles, and are both liable to the same objections. By whose fault the accident happened was a question of fact to be decided by the jury upon the whole evidence before them. And the error in the prayer on the part of the plaintiffs, as well as that offered by the defendant, consists in this, that it sought to withdraw from the jury the decision of the fact, and asked the court to instruct them, as a matter of law, upon the sufficiency or insufficiency of certain evidence offered to prove it; and both prayers are still more objectionable because each of them asks the instruction upon a part only of the testimony, leaving out of view various other portions of it which the jury were bound to consider in forming their verdict. If the collision was the fault of the pilot alone, then the owners of the Tasso are not answerable. But if it was altogether

or in part caused by the misconduct, negligence, or unskilfulness of the master or mariners, the owner is liable. And if the equipments and tackle were in this case insufficient, and not as strong and safe as those ordinarily used for such vessels in such cases, and thereby rendered the care and skill of the pilot unavailing, it was undoubtedly the fault of the master or owner; and is equally inexcusable as the omission to provide a competent crew. And it was for the jury upon the whole evidence to say whether it was the result of accident, arising from strong wind and tide, against which ordinary skill and care could not have guarded; or the fault of the pilot; or the misconduct, negligence, or unskilfulness of the crew; or the insufficiency of the hawser, ropes, or equipments with which the vessel was furnished. In the two first instances the owner of the Tasso is not answerable; in the two latter he is. The court, therefore, were right in refusing the direction asked for by the plaintiffs, but erred in giving the one before mentioned at the request of the defendants. And for this reason the judgment of the Circuit Court must be reversed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States, for the District of Columbia, holden in and for the county of Washington, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be and the same is hereby reversed, with costs, and that this cause be and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo.*

RICHARD B. ALEXANDER, PLAINTIFF IN ERROR, *v.* MOSES GRAHAM, DEFENDANT IN ERROR.

IN error to the Circuit Court of the United States for the District of Columbia, in and for the county of Washington.

The plaintiff in error having filed an order in writing, directing the clerk to dismiss this suit, it is thereupon now, here, considered, ordered, and adjudged by this court, that this writ of error be and the same is hereby dismissed with costs.

LESSEE OF JOHN MERCER, AND MARY SCOTT MERCER, HIS WIFE, PLAINTIFFS IN ERROR, *v.* WILLIAM CARY SELDEN, DEFENDANT.

The statute of limitation of Virginia, passed in 1785, barred the right of entry, unless suit was brought within twenty years next after the cause of action accrued. The savings are infancy, coverture, &c., and such persons are barred if they do not bring their action within ten years next after their disabilities shall be removed.

The circumstances under which the defendant held in this particular case, constitute an adverse possession.

Disabilities which bring a person within the exceptions of the statute cannot be piled one upon another; but a party, claiming the benent of the proviso, can only avail himself of the disability existing when the right of action first accrued.

The general rule of law is, that there must be an entry during coverture, to enable the husband to claim a tenancy by the courtesy.

THIS case was brought up by writ of error from the Circuit Court of the United States for the eastern district of Virginia.

The facts in the case are stated in the commencement of the opinion of the court, which the reader is requested to turn to and peruse, before referring to the sketch of the arguments of counsel.

The decision of the court being made to rest entirely upon the statute of limitations, all those branches of the argument relating

to the invalidity of the deed from Selden and wife to Dr. Mackay, on account of its not having been read to her, and of a defect in its acknowledgment, are omitted.

Whipple and *Walter Jones*, for the plaintiffs.

Chapman Johnson, for defendant.

On the part of the plaintiffs, it was argued: 1. That Mrs. Swann and her children were within the express exceptions of the statute; under the double disability of infancy and coverture.

2. That no disseisin or adverse possession is operated by any length of continued possession, however hostile may be the new pretence of title under which possession is held over, if the possession were not tortious at its inception, but in subordination to or consistent with the true title.

3. That this is especially true where a husband, who having rightfully come into possession *jure uxoris*, holds out possession against her heir after descent cast by her death; however hostile the claim and strong the colour of exclusive title asserted for himself; and though the heir be *sui juris*, and in no nearer relation to husband and wife than simply as her heir at law.

4. That the intrusion, even of a mere stranger, on lands descended to an infant, constitutes the intruder, *ipso facto*, a fiduciary possessor, *quasi* guardian, subject both at law and in equity to all the duties and liabilities of such fiduciary possessor, and utterly incapable of converting his fiduciary possession into a disseisin or adverse possession.

5. *Multo fortiore*, when, as in this case, the heirs were not only infants, but united in their persons all the relations of his step-children, of co-heirs to his wife, and his wards; when the guardian care and conservation of all their rights of property and of possession had devolved, as a strict legal duty, on him *ex officio*.

6. That the right of action had never accrued when the infants had a right to sue, being restrained either by coverture or a tenancy by the courtesy.

On the part of the defendant, it was argued, that none of the exceptions in the statute have any application to this case, but those in favour of infants and femes coverts. The right of entry of Mrs. Mercer's mother, and of her uncle, John Page, accrued at the death of Mrs. Selden, in 1787; or, at the latest, accrued to

John Page when he attained full age, prior to 1792, and to Mrs. Swann when she was married, in April, 1794.

First, as to John Page.

His disability of infancy being removed, and the guardianship account being settled in 1792, his right of entry, if any remained to him, certainly accrued as early as the 21st of December, 1792, when he was under no disability, and so he remained until his death in the year 1800.

The statute having begun to run against him in his lifetime, runs over all subsequent disabilities. Adams on Ejectment, 59; 2 Preston on Abstracts, 339; Blanchard on Limitations, 19, in the first vol. of the Law Library, 10; Jackson dem. Colden v. Moore, 13 Johns. 513; Jackson dem. Livingston v. Robins, 15 Johns. 169; Fitzhugh v. Anderson, 2 Hen. and Mumf. 306; Hudson v. Hudson's Adm., 6 Munf. 355; Parson v. McCracken, 9 Leigh. 501, 507.

Secondly, as to Mrs. Swann.

Her right of entry accrued either when she was an infant and unmarried at the death of her mother, or when she was both an infant and a married woman, in April, 1794. Her disability of infancy ceased a few months after her marriage, and her disability of coverture ceased at her death, in 1812. But so far as regards her daughter, Mrs. Mercer, there has been a succession of disabilities from the death of Mrs. Selden to the present day.

Can these disabilities be united so as to continue her protection?

The authorities relied upon to maintain the power of tacking disabilities, are Blanchard on Lim. 19, 20, in Law Library, 10, 11; 2 Preston on Abstracts, 340; Cotterell v. Dutton, 4 Taunton, 826. But even Blanchard's opinion is, that successive disabilities in different persons cannot be connected; and Preston states that the later decisions are, that successive disabilities cannot be united, 2 vol. p. 341; and the following authorities prove that they cannot: Adams on Ejectment, 60; 6 East, 80; approved in Tolson v. Kaye, 3 Broderip and Bingham, 223, decided in Common Pleas, in 1822; Eager and wife v. Commonwealth, 4 Mass. 182; Griswold v. Butler, 3 Conn. Rep. 227; Floyd v. Johnson, 2 Littel, 114; Clay's heirs v. Miller, 3 Monroe, 148; Thompson v. Smith, 7 Serg. and Rawle, 209; Demarest and

wife *v.* Winkoop, 3 Johnson's Ch. Rep. 129; Jackson *v.* Wheat, 18 Johns. 40; Jackson *v.* Johnson, 5 Cowen, 74; Bradstreet *v.* Clarke, 12 Wendell, 602; Doe dem. Lewis *v.* Barksdale, 2 Brock. 436; Parsons *v.* McCracken, 9 Leigh. 495. In the last case Judge Parker cites the case of Swann *v.* Selden, as authority for the same proposition, it having been recognised by Judges Cabell and Brockenborough.

If the plaintiffs are not within the exceptions to the statute, then the question is, whether, supposing them to be under no disability, they are within the principle of the statute; or, in other words, has there been an actual adversary possession in the defendant, and those under whom he claims, for fifteen years before bringing this suit?

Here it must be remembered that we are trying this question, not upon the testimony of witnesses, not upon the evidence of facts from which other facts may be inferred, but upon a special verdict finding all the facts, and leaving to the decision of the court the naked question of law, whether these facts constitute a possession which the statute of limitations will protect. In Bradstreet *v.* Huntingdon, 5 Peters, 402, it is said, "Adverse possession is a legal idea, admits of a legal definition, and is therefore a question of law."

Taylor dem. Atkyns *v.* Horde, 1 Burrow. 60, was upon a special verdict finding the facts, and referring the law to the court; and in that case it being ascertained that the plaintiff's right of action had accrued more than twenty years before the bringing of the suit, he was regarded as having the *onus* thrown upon him of showing why he had not sooner entered. This case is reported also in Cowper, 689, and 6 Brown's P. C. 633; it is also stated in 3 Cruise's Dig. title 31, c. 2 and 33.

In this case, (Taylor *v.* Horde,) the verdict did not find that the possession was adversary; but it found the facts upon which the court pronounced that the plaintiff's title was barred by the statute. The case seems to have been briefly this. There was tenant in tail with power to make leases for lives, and with remainder in tail to the right heirs of the grantor. The tenant in tail made leases for three lives, and afterwards suffered a common recovery with a view of barring the entail, and cutting off the remainders limited thereupon. The person entitled to the re-

mainder in fee died, having devised it to the lessor of the plaintiff. The tenant in tail afterwards died in the year 1711 without issue, and his heir, claiming under the common recovery, entered, and he and those claiming under him continued to hold the land till the year 1753. The survivor of the three lessees for life died in 1752, and then the devisee of the remainderman in fee entered and made the lease on which the action was brought. The defendants defended themselves upon two grounds: 1st, that the common recovery had barred the remainder in fee; and 2d, that if it had not, the statute of limitations had barred the entry of the plaintiff. The plaintiff insisted that the common recovery was void for want of a proper tenant to the *præcipe*, and so the court held. The plaintiff also insisted that his right of action did not accrue till the death of the surviving lessee for life, so that there was no bar of his entry; but the court held that the lease for lives was void, so that the plaintiff's right of entry accrued in 1711, and was barred by the statute. This judgment of K. B. was affirmed in House of Lords.

La Trombois *v.* Jackson, 8 Cowen, 589, was also a case of a special verdict, finding the facts, which the court held to amount to an adverse possession. The facts which, in the opinion of the court, constituted an adverse possession in the defendant were, long possession under a contract for a future conveyance from a person not shown to have had any title, improvement and cultivation. His long possession and enjoyment of the property, claiming it as his own, was held sufficient. The fact of possession, and the *quo animo* it was commenced and continued, were regarded as the tests of adversary possession. See page 609.

Clay *v.* Ransome, 1 Munf. 454, was the case of a special verdict finding possession in the defendant. Held that the defendant would have been protected if it had been found with certainty that such possession had continued twenty years, besides the five years and one hundred and seventy-four days, included by the act of Assembly on account of the war; and this being left uncertain, a *venire de novo* was awarded.

Let us examine what there is in our case which should make the possession of Dr. Selden and his son fiduciary.

Shall fraud or trust be imputed to its origin? Both these grounds have been fully investigated in the Court of Chancery,

and both repudiated by the final decree of that court, affirmed by the Court of Appeals.

But if they could be resorted to here, then the statute would run against the fraud from the time it was discovered, and would run in favour of the trustee from the time that the trust was openly repudiated.

As to fraud, see Wamburzee *v.* Kennedy, 4 Desauss. 479; Sweat *v.* Arrington, 2 Hayw. 129; Thompson *v.* Blair, 3 Murphy, 583; Van Rhyn *v.* Vincent, 1 McCord's Ch. R. 314.

As to trust. It is held that time will bar even an express voluntary trust, beginning to run from the period of its known disavowal. See Blanchard on Lim. 75, 1 Law Library, 39; Pipher *v.* Lodge, 4 Serg. and Rawle, 310; Boone *v.* Chiles, 10 Peters, 223; citing Willison *v.* Watkins, 3 Peters, 52; Kane *v.* Bloodgood, 7 Johns. Ch. R. 122; Hovenden *v.* Lord Annesley, 2 Sch. and Lef. 607, 636, 638.

And as to constructive trusts, see the same case of Boone *v.* Chiles, 10 Peters, 223, where it is said, "Though time does not bar a direct trust as between a trustee and *cestui que trust* till it is disavowed, yet where a constructive trust is made out in equity, time protects the trustee, though his conduct was originally fraudulent, and his purchase would have been repudiated for fraud." Citing for this, Andrew *v.* Wrigley, 4 Bro. Ch. C. 138; Beckford *v.* Wade, 17 Vesey, 97; Townsend *v.* Townsend, 1 Bro. Ch. C. 554. So the Court of Appeals of Virginia, in the case of Harrison *v.* Harrison, 1 Call, 428, holds this language: "The act of limitations does not run in favour of trustees, so long as the confidence may be fairly presumed to continue; but it runs both at law and in equity in favour of disseisors and *tort-feisors* having adverse possession."

So, though it is said in some cases in Johnson's Reports, cited on the part of the plaintiffs, that the adversary possession, to constitute a bar, must have been hostile in its inception, and so continued for twenty years; yet this phrase, "hostile in its inception," does not relate to the original entry of the defendant, but to the act by which the possession became adversary; in other words, whether the possession was originally hostile or not, it must have been hostile twenty years ago, and have continued so ever since. See Jackson *v.* Brink, 5 Cowen, 483.

Shall the defendant be treated as tenant for life holding over, so as to make him tenant by sufferance? This is repelled by special verdict, which finds that he held under claim of title, and took the rents and profits to his own use. But an express and acknowledged tenancy, as soon as the tenancy is disavowed and the right of the landlord openly denied, will become adversary. See Willison *v.* Watkins, 3 Peters, 49; Peyton *v.* Stith, 5 Peters, 485. Cited, 1 Pet. Digest, p. 148, pl. 32; also the pertinent case, Doe dem. Parker *v.* Gregory, 4 Neville and Manning, 308. Husband in possession, in right of his wife, held over after her death for more than twenty years; there being no evidence to show under what right he held or claimed to hold after her death, this possession barred the wife's heirs in ejectment.

Shall he be regarded as one entering under a void title, so that his possession would be regarded as subordinate to the title of the legal owner?

The special verdict ascertains that the fact is not so. For however ineffectual in law the conveyances may be to pass the legal title of Mrs. Selden, yet Dr. Selden did not enter under her deed, but under the deeds of Robert Mackay and Cary Selden, which, though they might not have conveyed a good title, are not void in law. Under this head the plaintiffs may rely upon the cases of Jackson *v.* Waters, 12 Johns. 365; Jackson *v.* Cairns, 20 Johns. 301; also, perhaps, on some other cases referred to in Adams on Ejectment, Appendix A, p. 464—468. After the decision of Jackson *v.* Waters, by the Supreme Court of New York, the case of Jackson *v.* La Trombois came before the same court, in respect to the same title, but between different parties. The Supreme Court thought the case not distinguishable from Jackson *v.* Waters, and held, accordingly, that the possession of the defendant was not adversary. But this last case coming before the Court of Errors of New York under the style of La Trombois *v.* Jackson, 8 Cowen, 589, the judgment of the Supreme Court was unanimously reversed. The Court of Errors thought the case very distinguishable from Jackson *v.* Waters, which they did not profess to overrule; but the opinions of the judges on the doctrine of adversary possession produce the impression that they would have decided Jackson *v.* Waters differently.

But these cases furnish no warrant for the proposition that a

possession commencing under a void title may not become adversary.

The case in 12 Johnson, Jackson *v.* Waters, repudiates all claim under the grant of the French Canadian government, as a government altogether foreign to the colonial government of New York; so as to liken the possession of one claiming under such a grant to the possession of one without claim—upon the ground that such a grant was notoriously void, and so known to be by the person in possession under it. But the possession in that case was manifestly such as not to have created a bar, even if it had been adversary, and there is a strong intimation that it might have been ripened into a complete bar to the action.

Jackson *v.* Cairns, 20 Johns., was the case of a conveyance in fee of the wife's lands by deed of husband and wife, not executed by the wife so as to be obligatory upon her, and an immediate re-conveyance of the property to the husband in fee. The husband thenceforward claimed the land as his own, and mortgaged it for the payment of his debts. The wife died in 1795, having had issue by the marriage, and afterwards the husband died in 1802. His son and heir took possession, and made another mortgage upon the lands. The mortgage made by the husband was foreclosed in 1805, and under the decree of foreclosure, sold to Cairns, who held possession under the purchase till the heir of the wife brought his action of ejectment in 1817. The court held that as the original conveyance was void as to the wife, it could be regarded as the conveyance of the husband alone; that under the statute 32 Henry 8, and a similar statute in New York, the conveyance of the husband and wife operated to convey only his interest in the estate; that is, his tenancy by the courtesy, and produced no discontinuance of his wife's estate; that the re-conveyance to him operated only to re-vest him with his former estate. That, in like manner, the mortgage produced no discontinuance of his wife's estate; so that, after her death, his possession was that of tenant by the courtesy. The title of his wife's heir to the possession had not yet accrued, and his possession could not be adversary to the heir. They intimated an opinion that the mortgage by his heir did not render the possession adversary, but did not decide this point, as it was unnecessary. They consider the possession as becoming adversary at

the time of Cairns's purchase, in 1805. But this was within the period of limitation; they therefore held that the action was not barred.

Here it is obvious that the right of entry never accrued to the wife's heirs until the death of the husband, who had good title as tenant by the courtesy; and as but fifteen years had elapsed after the right of entry had accrued, the statute presented no bar.

But we maintain that the doctrine which assumes that possession, commencing under a void title, cannot become adversary and be protected by the statute, is in conflict with the principle of the statute and all the authorities.

The principle of the statute is to quiet possessions, and to protect tenants, after a reasonable length of time, from the necessity of exhibiting any title whatever.

The following considerations and cases are illustrative of the policy of the statute of limitations, and the favour with which it is regarded by the courts.

1. The statute of limitations has been emphatically called a statute of repose, &c. Beatty's Adm. *v.* Burnes's Adm., 8 Cranch, 98; 3 Cond. R. 51.

2. The statutes of limitation ought not to be viewed in an unfavourable light, as an unjust or discreditable defence, but should receive such support from the courts as would make it what it was intended to be, a statute of repose. It is a just and beneficial law, &c. Bell *v.* Morrison, 1 Peters, 360.

3. "Of late years the courts of England and in this country have considered statutes of limitation more favourably than formerly. They rest upon sound policy, and tend to the peace and welfare of society. The courts do not now, unless compelled by the force of former decisions, give a strained construction to evade the effect of those statutes. By requiring those who complain of injuries to seek redress by action at law within a reasonable time, a salutary vigilance is imposed, and an end is put to litigation." McClung *v.* Silliman, 3 Peters, 270.

4. "Statutes of limitation have been emphatically and justly denominated statutes of repose. The best interests of society require that causes of action should not be deferred an unreasonable time. This remark is peculiarly applicable to land titles. Nothing so much retards the growth or prosperity of a country

as insecurity of titles to real estate. Labour is paralyzed when the enjoyment of its fruits is uncertain; and litigation without limit produces ruinous consequences to individuals." The court therefore approves the Kentucky statutes of limitation. Bradstreet *v.* Huntington, 5 Peters, 407.

5. "From as early a date as the year 1705, Virginia has never been without an act of limitation; and no class of laws is more universally sanctioned by the practice of nations and the consent of mankind, than those laws which give peace and confidence to the actual possessor and tiller of the soil," &c. Hawkins et al. *v.* Barney's lessee, 5 Peters, 457.

The course of Kentucky approved, even her "seven years law;" same case. And among English cases, see the modern one of Tolson *v.* Kaye, 3 Bro. and Bing. 217, decided in Common Pleas, in 1822.

The case of Taylor *v.* Horde, already cited, is an authority to prove that possession held under a void common recovery was protected by the statute of limitations.

In Smith *v.* Bentis, 9 Johns. 180, Spencer, delivering the opinion of the court, said: "It has never been considered as necessary to constitute an adverse possession that there should be a rightful title. Whenever this defence is set up, the idea of right is excluded; the fact of possession and the *quo animo* it was commenced or continued are the only tests, and it must necessarily be exclusive of all other rights."

In Smith *v.* Lorillard, 10 Johns. 356, C. J. Kent said, in delivering the opinion of the court, that "after a continued possession for twenty years under pretence or claim of right, the actual possession ripens into a right of possession, which will toll an entry." See also La Trombois *v.* Jackson, 8 Cowen, 589, especially the opinions of Jones, (Chancellor,) p. 602, 603; and Spencer, p. 609—611, citing Jackson *v.* Wheat, 18 Johns. 44; Jackson *v.* Newton, 18 Johns. 355; Jackson *v.* Woodruff, 1 Cowen, 286.

In Jackson *v.* Newton, 18 Johns. 355, the possession of the defendant was held under a defective deed, a deed without a seal, which, therefore, passed no title, yet was considered adverse, and having continued for twenty years, barred the plaintiff's entry.

Ewing *v.* Burnett, 8 Peters, 41, holds that adverse possession

of twenty-one years under claim or colour of title merely void, is a bar to a recovery under an elder title by deed, although the adverse holder may have had notice of the deed. This was the case of an unenclosed lot in Cincinnati.

Harpending *v.* The Dutch Church, 16 Peters, 455, held that the title of a devisee, entering under a void devise, may be protected against the heirs by the statute of limitations. See also Hudson *v.* Hudson's Adm., 6 Munf. 355, and 5 Peters, 354; also Patton's lessee *v.* Easton, 1 Wheat. 479.

Lastly, shall Dr. Selden be regarded as having entered as guardian, and therefore holding in subordination to the title of his wards?

This fact is also repudiated by the special verdict, which finds that he entered in his own right; and by the decree of the Court of Chancery, which has rejected all claims against him as guardian.

But if he did enter as guardian, that guardianship has been long since terminated and the accounts finally settled. There is no authority to prove that a guardian will not be protected by the statute of limitations after his guardianship has terminated. On the contrary, Littleton, sect. 124; Co. Litt. 896, 90 a; Cro. Car 229; Cro. Jac. 219; which show that the guardian, whether *de jure* or *de facto*, whether *proprius tutor* or *alienus tutor*, is liable to the action of account on the part of his ward, show necessarily that he is entitled to the protection of the statute, because the action of account is expressly limited by the statute. It was so by the statute of James, and is so by that of Virginia.

So too, in equity, where the guardian is held to account for rents and profits, the court will lay hold of "any such thing" as a waiver of the account after the infant came of age, to put an end to the claim. Morgan *v.* Morgan, 1 Atkyns, 489.

Why should not the possession of a former guardian under a claim of right in himself, and a long and notorious application of the profits to his own use, as effectually disseise his former wards, and entitle him to the protection of the statute, as the possession of a tenant in common, joint tenant, or coparcener, denying the right of his co-tenant, and applying the profits to his own use, would disseise his co-tenant, and entitle the disseisor to the protection of the statute of limitations? See Adams on Ejectment, 56;

Blanchard on Lim. 9, 1 Law. Lib. 5; Fisher *v.* Prosser, Cowper, 218; Doe dem. Stellings *v.* Bird, 11 East, 50.

The case of Swann *v.* Selden, in the Court of Appeals, has decided the very question we are now considering. The opinions of Judges Brockenborough and Cabell, constituting the majority of the court, have held that the statute was a complete bar to all the equitable claims preferred in that cause. The case is not reported, but adduced in manuscript.

The opinion of the court was delivered by Mr. Justice McLEAN.

This case is brought before this court, from the Circuit Court of the eastern district of Virginia, by a writ of error.

An action of ejectment was commenced by the lessors of the plaintiff, to recover possession of certain undivided interests in a tract of land in Loudon county.

On the trial, the jury found a statement of facts, on which the questions of law mainly arise.

Mary Mason Selden was seised and possessed in fee simple of certain tracts of land in the county of Loudon, estimated to contain four thousand acres, a part of which is the land in controversy. She intermarried with Mann Page, who died in 1779, leaving his wife and three infant children, John, William Byrd, and Jane Byrd. Mrs. Page continued a widow, seised in her own right, until 1782, when she married Wilson Cary Selden; who in right of his wife entered upon and held the lands. Soon after the marriage, Selden became guardian of the three infant children aforesaid, gave bonds, &c., and continued to act as guardian during the minorities of the two sons, and until the marriage of the daughter.

On the 22d December, 1784, Selden and wife conveyed in fee simple to Cary Selden, father of the husband, the whole of the four thousand acres of land, with the exception of two thousand acres deeded to W. B. Page. Mrs. Selden was privily examined as the statute requires. This deed was acknowledged and recorded by Selden the 14th April, 1818, long after the decease of the grantee. On the 1st January, 1785, Cary Selden and wife re-conveyed the land, with the exception above stated, to Wilson C. Selden; which deed was also recorded the 14th April, 1818.

Selden and wife, previously to the execution of the above

deed to Cary Selden, made a deed to William Byrd Page, son of Mrs. Selden by her first marriage, for two thousand acres, part of the above tract of four thousand acres; which deed was never recorded and cannot now be found. From the time of their marriage, Selden and wife had their permanent dwelling in the county of Gloucester, until they removed to the county of Elizabeth City, where they established their residence. In September, 1787, Mrs. Selden, being in a low state of health, accompanied by her husband on a return from the Springs, was taken extremely ill at Winchester, in Frederick county, Virginia, where she died on the 17th of that month. Two days previous to her death Mrs. Selden, with her husband, executed a second deed to William Byrd Page, for two thousand acres by certain metes and bounds, and also a deed to Doct. Robert Mackay for two thousand acres, being the residue of the four thousand acres in Loudon aforesaid. On the 17th, it being the day of her decease, the privy examination of Mrs. Selden was taken to the above deeds, by three justices of the peace of Frederick county, under a commission issued by the clerk of Loudon county. Selden, on the 8th October, 1787, acknowledged the above deeds, and they were ordered to be recorded. On the 17th September aforesaid, and after the decease of Mrs. Selden, Mackay re-conveyed the land conveyed to him as above stated, to Wilson C. Selden. This deed was recorded the 8th October ensuing.

From the time of his marriage to the decease of Mrs. Selden, Selden, in right of his wife, held possession of the premises in controversy. After her death he continued to hold possession, taking the rents, issues, and profits for his own use; claiming the land under the above deed. In 1818, when the legal sufficiency of that deed was questioned, he caused the deeds to and from his father to be recorded, as above stated, and so continued to claim the premises under both deeds, and to exercise acts of ownership over the land until his death, in 1835. Between the years 1796 and 1812, Selden sold, conveyed, and delivered possession to different persons, and among others to Thomas Swann, who had intermarried with Jane Byrd Page, various parcels of the land.

In April, 1794, Jane Byrd Page, with the consent of her guardian, she being under twenty-one years of age, married

Thomas Swann; and died the 31st October, 1812, leaving seven infant children, her heirs at law. Among others, Mary Scott, one of the lessors of the plaintiff, who, in June, 1818, being under twenty-one years of age, intermarried with John Mercer, one of the lessors of the plaintiff. In 1796, having received from Selden £640, Thomas Swann executed a receipt, fully discharging him as guardian. John Page, the eldest son of Mrs. Selden, died in 1800, having devised all his estate, real and personal, after the death of his widow, Elizabeth K. Page, to two of the children of his brother William Byrd Page, to wit: William B. Page and Mary M. Page, and to three of the children of his sister, Jane B. Swann, to wit: Edward, Mary, and Thomas, as tenants in common. Edward and Thomas died intestate, and without issue. Mary intermarried as above stated with John Mercer.

After John Page, the above testator, had attained full age, on the 21st December, 1792, he settled with Selden, his guardian, and executed to him a release from all demands.

Thomas Swann, surviving his wife, conveyed by deed duly executed all his interest in the premises to his surviving children.

After William Byrd Page had attained full age, he made a claim against Selden, on account of inequality in the partition of the aforesaid four thousand acres of land, which claim was finally adjusted by the payment of one thousand pounds, and the purchase of five hundred acres of his land by Selden. And afterwards, on the 23d July, 1794, Page, having received full satisfaction from Selden as guardian, executed to him a release, &c.

From the death of Wilson Cary Selden up to the present time, the defendant, his son, has held the actual possession of the premises in dispute, claiming the same as his own, under the will of his father.

On the 6th December, 1819, the lessors of the plaintiff, claiming as heirs of Mrs. Swann, with others, instituted their suit in the Superior Court of Chancery held at Winchester, against Wilson Cary Selden and others, claiming the lands now in controversy, upon certain defects in the conveyances under which Selden claimed, and upon alleged equities. Answers were filed, and upon the final hearing in October, 1830, a decree was pronounced, whereby the court, "disclaiming jurisdiction of the alleged imperfections in the conveyances aforesaid, but taking jurisdiction

of the matters of equity, adjudged and decreed that the plaintiffs' bill should be dismissed with costs, but without prejudice to any suit at law which the plaintiffs might be advised to prosecute on account of the alleged legal defects, or want of validity in the said deeds." This decree, on an appeal to the Supreme Court of Appeals, was affirmed the 17th of April, 1837.

This cause has been ably and elaborately argued. Some points have been made and illustrated with great research and ingenuity, which, from the view taken of the case by the court, are not essentially involved in the decision. Among these are the construction of the statutes under which the deed from Selden and wife to Cary Selden, in 1784, was executed and recorded; and also the deed from Selden and wife to Mackay, in 1787.

We will consider the case in reference to the statute of limitations.

The statute of 1785 bars the right of entry, unless suit be brought within twenty years next after the cause of action accrues. The savings are "infancy, coverture, non compos mentis, imprisonment, or not being within the commonwealth at the time the right of action accrued." And such persons are barred if they do not bring their action within ten years next after their disabilities shall be removed.

Selden took possession of the premises in controversy, claiming them as his own under the deed from Mackay, in the fall of 1787. Prior to that time, his possession was in right of his wife. Under the deed from Mackay his possession was adverse to the right of the lessors of the plaintiff. He avowed his ownership by placing the deed upon record, by enjoying the profits of the land, and by selling and conveying different parcels of it.

In no sense can he be considered as holding possession, in virtue of his rights as guardian of the heirs of his deceased wife, or as tenant by the courtesy. The right under which he held possession during the life of his wife terminated at her death, there being no issue of the marriage. From this time he possessed and claimed the premises as his own. This was notorious to the public, and especially to the heirs of his wife. John Page, in his lifetime, settled with Selden as guardian, and executed to him a release of all demands. William Byrd Page received from him one thousand pounds, the estimated difference in value between

the part of the four thousand acres conveyed to him over that which was conveyed to Page. Thomas Swann, the husband of Jane Byrd Page, actually purchased from Selden a part of the land conveyed to him by Mackay. Swann, at the time of the purchase, was a highly respectable lawyer, and not only knew that Selden claimed the land adversely, but he recognised the validity of such claim by the purchase.

Until his death in 1835, Selden continued in possession of the premises, and his son, the defendant, still holds the same adversely under his father's will. From these facts it is clear that the lessors of the plaintiff are barred by the statute, unless they shall bring themselves within its exceptions.

The right of action accrued in 1787. At that time Jane Byrd Page, being an infant, was within the exception of the statute, and it is insisted that her marriage with Swann before she was twenty-one years of age, added to her first disability that of coverture.

Mr. Preston, in his Abstracts, 2 vol. 339, says, "If the right accrues to a person who is at that time under a disability, the fine will not begin to run against him till he shall be free from disability; and successive disabilities, without any intermission, will continue to him a protection against being barred by non-claim: but any cessation of disability will call the statute into operative force, and no subsequent disability will arrest the bar produced by the statute."

The saving in the Virginia statute is the same as that of the 21st of Jac. 1, but it has received in this country a different construction from that stated by Mr. Preston. In Parsons *v.* McCracken and wife, 9 Leigh. 495, Mr. Justice Parker says, speaking of this statute, "I am of opinion that cumulative disabilities ought not to prevent its operation; and that upon a sound construction of the act, a party claiming the benefit of the proviso can only avail himself of the disability existing when the right of action first accrued; since, otherwise, the assertion of claims might be postponed for the period of the longest life, and possessions disturbed after sixty, eighty, or even a hundred years." In that case, as in the one under consideration, the female in whom the right vested, married before the disability of infancy had ceased.

In the same case Mr. Justice Brockenborough says, "If she married after she became of age, her subsequent coverture was not a disability which would obstruct the operation of the statute; and even if she married while yet an infant, we cannot mount one disability on another so as to prevent a continuous obstruction to its operation." Mr. Justice Tucker says, "It is true that Rebecca was an infant, but she came of age in 1824, when her disability ceased; for, notwithstanding some loose opinions to the contrary, she cannot tack the disability of marriage to that of infancy."

The same doctrine was recognised by the Court of Appeals, in the chancery case lately decided in that court, between the parties now before us. The same principle is sanctioned 2 Hen. and Munf. 306; and in Eager and wife *v.* Commonwealth, 4 Mass. 182; Jackson *v.* Wheat, 18 Johns. 40; Demarest *v.* Wynkoop, 3 Johns. Ch. 129.

Chancellor Kent says, in the last case cited, "I am clearly of opinion, that the party can only avail himself of the disabilities existing when the right of action first accrued." In 1 Plowd. 375, it is laid down that, "if several disabilities exist together at the time the right of action accrues, the statute does not begin to run until the party has survived them all." In Doe *v.* Jesson, 6 East, 80, it was held that cumulative disabilities in different persons could not be added.

At the time of her marriage, in April, 1794, Mrs. Swann wanted about three months of being of full age. Of course, in July ensuing, she was of age, from which time the statute began to operate, and in twenty years would have barred her right of entry, had she survived. But her death in 1812 arrested the operation of the statute, and gave her heirs ten years within which to bring their action. The proviso in the statute, after enumerating the exceptions, among which are infancy and coverture, declares that "every such person, and his or her heirs, shall and may, notwithstanding the said twenty years are, or shall be expired, bring and maintain his action, or make his entry, within ten years next after such disabilities removed, or the death of the person so disabled, and not afterwards."

By the settled construction of this proviso, the heir has ten years to bring his action, where his ancestor is not barred. This

time is given him without reference to the time that has elapsed or the disabilities of his ancestor, if the right of entry has not been tolled.

But it is insisted that the right of entry did not devolve on the heirs of Mrs. Swann at her decease, as her husband became tenant by the courtesy.

In 1 Coke on Litt. 29, c. 4, sect. 35, it is said, "Tenant by the courtesy of England is, where a man taketh a wife seised in fee simple, or in fee tail general, or seised as heir in tail special, and hath issue by the same wife, male or female, born alive, albeit the issue after dieth or liveth, yet if the wife dies, the husband shall hold the land during his life, by the laws of England."

"And first, of what seisin a man shall be tenant by the courtesy. There is in law a twofold seisin, viz., a seisin in deed and a seisin in law. And here Littleton intendeth a seisin in deed, if it may be attained unto, as if a man dieth seised of lands in fee simple, or fee tail general, and these lands descend to his daughter, and she taketh a husband and hath issue, and dieth before any entry, the husband shall not be tenant by the courtesy; and yet in this case she had a seisin in law; but if she or her husband had during her life entered, he should have been tenant by the courtesy."

The wife at common law was endowable where there had been no actual possession, and the reason is, that during coverture she could not take possession of the lands of her husband. But actual seisin was necessary to enable the husband to claim as tenant by the courtesy. This rule was not inflexible. It yielded to circumstances, as in the case of an advowson, or rent, or where an entry was prevented by force. Litt. s. 417, 418. In like manner, if a man have a title of entry into lands, but does not enter for fear of bodily harm, and he approach as near the land as he dare, and claim the land as his own, he hath presently, by such claim, a possession and seisin in the land, as if he had entered in deed. Litt. s. 419. And, under some circumstances, living within view of the land will give the feoffee a seisin in deed, as fully as if he had made an entry. It has been held that the husband may claim as tenant by the courtesy, without entry, wild lands of which his wife was seised, and which were not held adversely. But the general rule of law is, that

there must be an entry during coverture, to enable the husband to claim by the courtesy.

At no time during the life of Mrs. Swann, does it appear that there was an entry upon the premises in controversy by herself or her husband. On the contrary, it appears the defendant and his ancestor held the land adversely. It is clear, therefore, that Swann could not claim as tenant by the courtesy, and consequently no such right could interpose to prevent the entry of the heirs of his wife. They were bound, without regard to their infancy or other disabilities, to bring their action in ten years from the decease of their ancestor. This results from the fact, that the right of action accrued in the lifetime of their ancestor, and the rule of law, which does not admit of cumulative disabilities.

By the same principles, the devisees of John Page, who died in 1800, are also barred. The statute also bars the right of entry in William Byrd Page.

From this view of the case, it can scarcely be necessary to notice the bill of exceptions taken on the trial by the plaintiff. So far as evidence was offered to disprove the consideration named in the deed to Mackay, with the view of rendering it invalid, the evidence was properly rejected. And so far as regards the circumstances which the plaintiff offered to prove, they could have no other, if any effect, than to create a suspicion of unfairness or fraud in the execution of the deed. All matters of fraud and trust arising out of this transaction were considered and decided in the case in equity lately brought before the Court of Appeals of Virginia, by the parties to the present suit. If that jurisdiction were rightfully exercised, it concludes all questions of fraud in this case. Upon the whole, we affirm the judgment of the Circuit Court.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the eastern district of Virginia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be and the same is hereby affirmed, with costs.

JOHN BUCHANNON AND OTHERS, COMPLAINANTS, *v.* EDWIN UPSHAW, RESPONDENT.

(Mr. Chief Justice TANEY did not sit in this cause.)

There were two titles to a tract of land, the senior title held by Upshaw, and the junior by Buckner, both derived from the same person who had sold to both.

Buckner soon afterwards sold to Buchannon, who paid Buckner and took possession.

Upshaw subsequently agreed to ratify the sale from the original holder to Buckner, upon receiving an assignment of Buckner's bond for the purchase money, not yet due, and other securities.

The bond not being paid, Upshaw brought an ejectment and obtained a judgment. Buckner's assignees filed a bill to obtain a perpetual injunction.

There is a privity of contract between them and Upshaw, and a perpetual injunction will be granted upon their fulfilling the obligations of Buckner, their assignor; it was not their duty, under the circumstances, to have *tendered* the money to Upshaw.

A power in Buckner to resell, and a sale made under that power, prior to Upshaw's giving his assent to the sale from the original holder to Buckner himself, did not extinguish the equitable right of Upshaw to receive the purchase money, or to proceed against the land.

Upshaw's right not destroyed by lapse of time, because he had brought suit on Buckner's bond and the other securities, and was not in a condition for a long time to make a valid title.

Upshaw, being held bound by his assent to the sale to Buckner, is entitled to the advantage which that paper gave him as to the application of part of the purchase money to one purchase in preference to another.

Interest must begin to run from the time when Upshaw asserted his claim to the land, and what is due to Upshaw must be made up by the present holders of the land, each one contributing in proportion to the price which he paid to Buckner.

THIS was an appeal from the Circuit Court of the United States for the district of Ohio, sitting as a court of chancery.

The case was this:

John Buchannon and others filed a bill in the Circuit Court of Ohio against Upshaw, stating that Upshaw had obtained a judgment in an action of ejectment against them, and praying for two things: 1. That he, Upshaw, might be perpetually enjoined from proceeding in execution upon said judgment; and, 2. That he might be compelled to convey by deed in fee simple, the land

which had been the subject of the suit in ejectment. The Circuit Court, after various proceedings, decreed that the injunction which had been temporarily granted, restraining Upshaw from suing out executions upon his judgment in ejectment, should be dissolved; that the bill should be dismissed, and that Buchannon and others should pay to Upshaw a certain sum of money for the rents and profits, after deducting the value of the improvements made upon the land. From this decree an appeal was taken to this court.

On the 11th of December, 1789, Beverly Roy obtained from the commonwealth of Virginia a patent for one thousand acres of land in the Virginia military district of Ohio, and within Clermont county. He sold three hundred acres of this tract to one Buchannon, and contracted to convey the remaining seven hundred (the land in controversy in the present suit) to Lyne Shackleford.

On the 10th April, 1797, Shackleford sold this tract of seven hundred acres to Upshaw, the defendant in the present appeal; but not having the legal title in himself at that time, he procured it to be made directly from Roy to Upshaw, without passing through himself. On the 20th of July, 1797, Roy accordingly executed a conveyance to Upshaw for these seven hundred acres, and also a bond for further assurance.

On the 16th November, 1797, Shackleford, being thus destitute of the legal title, nevertheless sold to Philip Buckner, the same tract of seven hundred acres which he had previously sold to Upshaw. It was alleged in the bill that this sale was made with Upshaw's consent, but no evidence of it was furnished, except that in the contract of 1801 his consent is stated to be given at some time prior to 1801. At the same time, Shackleford sold also to Buckner another tract of one thousand acres. The price for both tracts was £1020, without saying what was the sum for each tract. No part of it was to be paid in cash. A bond of Anderson for £600 held by Buckner was assigned to Shackleford; a claim against Coats for £250 was also assigned over; and for the balance Shackleford agreed to wait until Buckner sold the one thousand seven hundred acres, provided he sold it prior to January, 1799; if not, payment to be then made, or sooner if Buckner should sell.

In 1798 and 1799, Buckner sold to the complainants, or to those

under whom they claim, in several parcels, the whole of the seven hundred acres in question, who paid him in full therefor, received conveyances, and entered into possession.

On the 18th of April, 1801, Upshaw, having made some payments to Shackleford, entered into a new contract with him, which was endorsed on the original one, stating "that since the date of the within, Shackleford had, with the consent of Upshaw, sold the seven hundred acres of land to Buckner for £420, which sum is still due;" and it was agreed that Shackleford should assign Buckner's contract to Upshaw, who was to make a deed as soon as the money should be paid. But if, upon application, Buckner did not pay the said sum of money and interest, Upshaw was immediately to take proper steps to have the land sold to raise the money and interest.

On the 16th of May, 1803, Shackleford assigned to Upshaw the contract between Shackleford and Buckner, and authorized Upshaw to receive from Buckner the balance due on the same, amounting on that day to £530 9*s.*, having previously assigned the claim upon Coats's bond, and an order which Buckner had given upon one Copland, the attorney who was charged with its collection. The result of that claim may be stated in a few words. Suit was brought in the Circuit Court of the United States at Richmond, by John Marshall, in 1798, against Coats: there was a judgment, a *ca. sa.*, another *ca. sa.*; and, finally, it got into chancery against Coats's widow and children. The plaintiff at last gave it up in 1820.

Upshaw made more than one effort to obtain the money from Buckner, which was due under the contract assigned by Shackleford. In April, 1804, he empowered John H. Upshaw, who was going to Kentucky, to receive from Buckner the sum due on his contract; and, on the payment of the money, the agent was authorized to make a deed.

The agent called on Buckner, who expressed much anxiety to comply with his contract, and induced the agent to remain some days, in the hope of raising the money. But he failed to pay any part of it. The agent, after authorizing John O'Bannon to receive the money from Buckner, and make him a deed, returned to Virginia.

Upshaw drew an order on John O'Bannon in April, 1807, for

the money, which was returned protested for non-acceptance. O'Bannon shortly after this died, and in the year 1813, or 1814, Upshaw obtained from his representatives the assigned contract of Buckner, which had been left with him, and on which was endorsed a credit for $100 on the 10th April, 1805, and another for the same amount, 18th April, 1806. On obtaining the contract, Upshaw caused an action to be brought on it against Buckner for the money. The suit being brought in the name of Upshaw, as assignee of Shackleford, there was a demurrer to the declaration; and at May term, 1815, the Circuit Court of the United States for Kentucky sustained the demurrer, and the action failed.

Shortly after this, Upshaw commenced an action of ejectment, in the Circuit Court of the United States for the district of Ohio, against Buchannon and others, who occupied the land, to recover possession of it, which, at May term, 1816, failed, on the ground that the patent emanated from the state of Virginia, subsequently to the deed of cession from Virginia to the United States; and of course Upshaw was only invested with the equitable title to the land.

In August, 1817, Roy and wife executed another deed to Upshaw for the land, in compliance with the covenant for further assurance, which he had entered into in 1797.

Some short time prior to December, 1820, Buckner died. His will, made in February, 1817, contains bequests of real estate and some small legacies of personalty. The executor filed two accounts, one in 1822, and the other in 1823, the latter showing a balance in the hands of the executor of $50 18 cents. It does not appear that any of his real estate was required to be sold to pay debts.

In 1826, Upshaw obtained from the United States a patent for the seven hundred acres.

In 1829, he brought another ejectment, in the Circuit Court of the United States for the district of Ohio, against Buchannon and others, occupiers of the land, and having now a patent from the United States, succeeded in obtaining judgment; upon which, Buchannon and others filed a bill upon the equity side of the same court, and obtained an injunction to stay proceedings. This is the bill mentioned in the commencement of this narrative,

which, upon hearing, was dismissed by the Circuit Court, and the injunction dissolved; and the case now came up by an appeal from that decree.

The proceedings in this case were diversified in its history, by two collateral chancery suits, one by John H. Upshaw against E. Upshaw, and another by E. Upshaw against Chamberlayne, the executor of Shackleford; but as the decision of this case does not rest upon any of the facts or principles disclosed in them, they are not further noticed.

Stanberry and *Leonard*, for the appellants.

I. Roy, the original owner of the equitable title to the seven hundred acres, sold the land to Shackleford. Shackleford, on the 10th April, 1797, sold the land to Upshaw by title bond, covenanting to make a deed. Afterwards, on the 16th July, 1797, Shackleford again sold the land to Buckner, by title bond, received a part of the purchase money, and agreed to wait for the residue until the money could be raised by a resale by Buckner.

In this state of facts the equity to be then administered between the then parties was obvious. Upshaw, as the first purchaser of the equitable title, was to be preferred to Buckner, although he may have purchased from Shackleford without notice.

The rule *prior in tempore, potior in jure*, would then have applied, for there was no laches, acquiescence, or fraud chargeable to Upshaw.

Next in order was the resale by Buckner to the complainants, the payment in full to Buckner, execution of deeds by Buckner to the purchasers, and the taking possession of the lands by the purchasers.

Notwithstanding all this, at that point of time, so far as any fact is yet developed, Upshaw's equity was the best. He stood then upon his first purchase of this equity. The subsequent sale by Shackleford to Buckner was in fraud of his title, and he had given no authority for such subsequent sale, and stood wholly unaffected by it.

But after all this, on the 18th April, 1801, Upshaw enters into communication with Shackleford, the fraudulent vendor, and they enter into an agreement under seal, in which it is recited, that the

sale made by Shackleford to Buckner, had been made with Upshaw's consent; they cancel the prior agreement which witnessed the first sale from Shackleford to Upshaw; and Shackleford agrees to assign to Upshaw the contract with Buckner, and to authorize him to receive the money due from Buckner; that is, the £420, with interest at 5 per cent.

In conformity with this arrangement, on the 7th May, 1803, Shackleford delivered to Upshaw, Buckner's order on Copland for the Coats money; and on the 16th of the same month assigns to Upshaw the cofitract with Buckner; and on the 17th of the same month, Upshaw releases Shackleford from the contract in which he had made the first sale to Upshaw.

After all this, there remains no question between different equities. The prior equitable title of Upshaw was extinguished. He could no longer assert his prior equitable title as superior to that of Buckner, but must stand in the shoes of Shackleford, and recognise the equity of Buckner. The bill alleges that Shackleford made the second sale to Buckner with Upshaw's consent. Upshaw denies any prior consent, but says he assented to it qualifiedly afterwards. I do not know that it makes much difference, as to the extinguishment of his prior equitable title, whether the assent was prior or subsequent to the second sale; but as the proof stands, the prior consent is established beyond all denial. He has acknowledged under his seal, that Shackleford had made the sale with his consent, and that stops him from saying the contrary.

And again, if the consent to the second sale, whether prior or subsequent, did not extinguish Upshaw's prior equity, it is extinguished by express release in the agreement between himself and Shackleford of the 17th May, 1803.

Upshaw, therefore, must stand upon the contract between Shackleford and Buckner. He must stand as the assignee of the vendor to Buckner.

Let us now examine that contract, and ascertain what interest passed by it to Buckner, or upon a resale by him to these complainants, and what interest remained in the vendor.

At the date of this contract, the legal title to this seven hundred acres was in the United States. A patent had been granted for it by the state of Virginia to Roy, the warrantee, but it

was wholly inoperative, being made years after the deed of cession.

The subject-matter of sale was, therefore, an equitable interest in land. This interest passed effectually to Buckner by a written contract, sufficient to satisfy the statute of frauds; and this, notwithstanding the purchase-money was not paid. Hampson *v.* Edelen, 2 Har. and Johns. 64. It passed in the same manner upon the sale by Buckner to the complainants.

What remained in the vendor, Shackleford, or in Upshaw, his assignee? No title, no interest in the land. If any thing remained, it was simply a lien for the unpaid purchase-money, as against Buckner, while the land remained unsold by him.

Twenty-nine years after this sale to Buckner, Upshaw, pretending to be the owner of this equitable title, obtained a patent from the United States. If he had, at the time he so procured the patent, no title to the land, and no lien upon it for the purchase-money, the consequence is irresistible that he holds it as trustee for the real owner.

I have shown he had no title to the land. Let us now inquire if he had a lien upon it.

The lien of the vendor for his unpaid purchase-money arises as well upon the sale of an equitable interest as upon a conveyance of the legal title. It is a creature of equity raised between the immediate parties to the contract, and sustained only against subsequent purchasers when affected with notice of it.

There is no other lien or charge upon an estate so shadowy and so little obvious as this lien of the vendor. It is never to be found of record; it does not depend upon possession of the estate or the muniments of the title. It is not sustained by any matter of constructive notice, but only exists as to third persons fixed with actual notice.

The essence of this lien is that the vendor looks to the land alone for the money, or the land and the purchaser.

If he takes collateral security, such as the note of a third person, or if he takes simply a mortgage on the land for only a part of the purchase-money, or if he does any other act manifestative of an intention to look primarily to any other fund than the land,

the lien never arises. Or when the lien has first attached, if he assigns the note of the vendee, or if he is guilty of laches, the lien is gone.

We claim no lien ever existed upon this land in favour of Shackleford, or Upshaw, his assignee.

1. Because the contract of sale looks to a resale, and to the fund arising upon such resale, as the fund for payment, and does not look to the land.

Shackleford agrees to wait for the unpaid purchase-money until Buckner should sell the land. The moment the land is sold the purchase-money becomes due; but, if it is not sold, the purchase-money does not become payable until fourteen months after the date of the contract.

Whenever the contract contains such consent to a resale, and looks to the fund to be produced on a resale, there is no lien on the land. Sugd. Vend. 552. Ex parte Parker, Glyn and Jam. 228. Coad *v.* Pollard, 9 Price, 544; 10 Price, 109.

We do not pretend that Buckner was the agent of Shackleford in making the resale, and that, therefore, payment to him was payment to his principal. We do not put this as a case between principal and attorney. The simple question is, after such a contract, after such an agreement, after a sale to a third person, and payment in full by that third person, can the vendor say to the new purchaser, "You have paid your immediate vendor just as I agreed you should, and I took his covenant. I relied upon his faith to pay me the money; but he has not done so, and I now require that the loss shall fall upon you and not upon me, and that you shall now pay me again for the same land which I consented you should first pay for to another!"

Now, putting the case in the strongest light for Upshaw, placing him in the situation of a vendor, not the mere assignee of the vendor, investing him with a legal title retained upon the sale to Buckner, yet, is it not clear, that a court of equity would compel him at once to convey that legal title to the second vendee, who had fully paid his purchase-money?

Whenever the holder of a legal title encourages a purchaser to deal with another for his estate, or invests another person with the means of imposing upon others as the true owner, or is silent when a purchaser is dealing with another for his estate, a court

of equity will never allow him afterwards to assert that legal title against the purchaser.

In a court of equity, when the conscience of the party is not affected, the holding of the legal title is every thing. A satisfied mortgage, an outstanding term, a deed surreptitiously obtained, are equally available; but, where in reference to third persons the conduct of the holder of the legal title has been such as that it would be inequitable to assert it against the holder of the equitable title, then a legal title is no protection. 1 P. Williams, 393; 3 Russel, 1; Sugd. Vend. 728; Finch's Rep. 28.

It is said the complainants were bound to know what sort of title Buckner had, that they must be taken to know that he held only by contract and had not paid his vendor.

Take it as granted, and suppose them to have had notice of the very article under which Buckner held, and what then? What is the language there held by Shackleford? "I consent that, in order to raise a fund to pay me what is yet due, you may sell this land to others; they are to pay for the land to you, not to me, and you are to pay it to me. I look, not to the land, but to the fund which is to come in place of the land, and I trust you to receive and pay it over to me. I give you fourteen months to pay the money, if you do not sooner sell the land; but the moment you sell it, if it be to-morrow, you are to take the money you receive and out of it pay me my debt."

We say, therefore, because of this clause of resale, there was no lien on the land.

II. Lien lost by laches.

But, if there was a lien for the purchase-money after the sale to the complainants, we next claim that it was lost long ago by laches of Upshaw.

We have shown that Upshaw stood, not as vendor, but simply as his assignee of the debt due for the purchase-money. He was once connected with this land as a purchaser; but we have shown that he released the interest so acquired to Shackleford, and agreed to take a certain sum of money instead of the land. He had, therefore, in fact, only a money claim. The land was never his, nor intended to become his.

We take it as granted, in this view of the case, that he might look to the land as security or means of payment, but he had

other security, the money due from Coats for a part, and the responsibility of Buckner for the whole. Time and laches would bar him of all these securities. The debt was the principal thing, the lien on the land the mere incident. Time would bar the debt. It would be most singular that after a lapse of thirty years we should find not only this debt yét valid, but the mere collateral lien which attended it also in full vigour. It would require sleepless vigilance to bring that about. Instead of this, there has been, so far at least as the lien is concerned, the most culpable negligence.

The Coats bond covered only part of the debt, £250 out of £420; for the difference, £170, Upshaw could look only to Buckner or the land. Nothing appears to show that any step was taken by Upshaw on the Coats claim. A suit had been brought upon it in 1798, three years before he became the assignee of Shackleford. Judgment was rendered on it in 1800, and the writ of *ca. sa.* had been in that year returned, not found. The original suit had been commenced by *capias*, bail given, but no suit appears even to have been brought on the bail bond. An *alias ca. sa.* in 1801, never returned, is the last step taken upon the judgment. For the nine succeeding years no step is taken. On the 4th January, 1809, Buckner takes the matter in hand, and gives a power of attorney to Marshall to collect the money from Coats. In 1810, a bill is filed, in Buckner's name, against Coats's representatives, to set aside a fraudulent settlement, which is continued for ten years, and then dismissed upon the default of the plaintiff, December, 1820.

There is no evidence of the slightest action of Upshaw in these proceedings, nor is any thing of the sort stated in the answer. The only statement in the answer is, that the suit against Coats "was diligently prosecuted." It is not said by whom. We have seen, however, how diligently.

Then as to the claim on Buckner. The steps taken by Buckner are the following:

In April, 1804, (three years after the assignment from Shackleford,) Upshaw sent by John H. Upshaw to demand the money. It was not paid, and the claim was put by John H. Upshaw in the hands of O'Bannon for collection, who received $200 from Buckner, but did nothing more.

In December, 1805, Upshaw assigned £500 of the Buckner debt to John H. Upshaw, and gave him an order on O'Bannon, April 1, 1807, to receive the money if collected. This order was protested for nonpayment. Nothing further is done for seven years; until February, 1814, when Upshaw commences a suit, in his own name, against Buckner, on the Shackleford contract. Buckner demurred to declaration, on the ground that the action should have been brought in Shackleford's name, and the demurrer was sustained, and judgment upon it against Upshaw at May term, 1815. This was the end of all vigilance as to Buckner, who lived until 1820, and then died possessed of large real and personal estate. His estate has since been settled, and it appears it was not necessary to sell his real estate to pay his debts.

This is the sum total of vigilance as to Coats and Buckner, showing the most tardy proceedings, and those defeated by the gross ignorance of Upshaw's agents.

Now it would be strange if all this delay has not wholly defeated all prospect of a recovery, of either the Coats claim, or the debt against Buckner. In all probability the Kentucky statute has long since barred an action in favour of Shackleford or Buckner; or, if there be no limitation in that state as to specialty debts, as we believe is the case, the presumption of payment is conclusive. And the Virginia statute has barred the action against Coats's bail, or against the sheriff for failing to return the last *ca. sa.* Or, if there was no bar by limitation or presumption, the assets of Coats and Buckner are beyond the reach of their creditors. One has been dead nearly forty years, the other (Buckner) twenty-two years.

With what conscience can Upshaw, after all this delay and loss, seek to make these purchasers from Buckner again pay for their lands? If he had come forward in good time, they undoubtedly might have reimbursed themselves, by action against Buckner, either upon the covenants in his deed or (by subrogation) on the contract with Shackleford; but as it is, his negligence has put that beyond reasonable probability.

But if Upshaw had been vigilant against Coats and Buckner, it is no excuse for his laches as against these complainants. He did know, as early as 1799, that these complainants were in possession of these lands, claiming and improving them as their own.

Now in 1815, he was pursuing Buckner for the money; and up to 1820 the suit in chancery was going forward as to the Coats claim. He still considered the contract as open, and never makes any demand of these complainants. In 1818, he seeks to turn them out of possession by an action of ejectment. He does not ask them for the money. He does not exhibit his right to receive it; but demands their land, and when he comes to show his right to that, he exhibits nothing but a void patent.

He then lies by for eight years, until 1826, and obtains a patent from the United States by means of his deed from Roy the warrantee, which deed was obtained in confirmation of a contract which he had released and rescinded; and at last in 1829, after these complainants had been in peaceable possession, to his knowledge, for thirty years, he brings his last ejectment, and seeks to turn them off the land.

Now, so far as his right to make these complainants pay him Buckner's debt is concerned, there has been no demand for thirty years, and in the mean time, in consequence of his laches, these complainants have lost all chance of indemnity from Buckner.

Such laches will bar not only a mere equitable lien for purchase-money, which is the most that Upshaw ever had, but in equity it would bar a legal title, especially one obtained from a mere trustee, under circumstances like the present.

The rule *prior in tempore* does not apply where the holder of the first equity is guilty of laches. Sug. Vend. 728, 729.

We claim, therefore, that Upshaw is not entitled to demand the Buckner debt from the complainants. If he is entitled to any relief against the complainants, it is only to that. But the decree of the Circuit Court goes quite beyond that, and gives him the land itself, and, in addition, a sum of money for rents and profits larger than the Buckner debt, principal and interest!

This part of the decree proceeds upon the idea that he sold this land—that he stands as vendor—his purchase-money unpaid—guilty of no laches; and that these complainants, as purchasers, have refused to pay him their purchase-money, or have wrongfully delayed it so long, that he can rescind it, and take back his land. I have already shown the gross laches on his part, so gross, that if he was the immediate vendor of the complainants,

and they had agreed to pay him the purchase-money, he could not recover it, but it would long ago have been barred, or presumed to be paid.

But the complainants, what have they done to lose their land to Upshaw?

He is not their vendor. He is (as has been shown) the mere assignee of a debt, never looking to this land but as a means of securing its payment. He has never demanded payment of them. With full knowledge, he allowed them to go on for thirty years, wasting the best of their lives in reclaiming this land from the wilderness. They have been guilty of no laches—of no bad faith. They say in their bill that they were in total ignorance of his claim, or of any defect in their title, until he recovered against them in the last ejectment; and all this Upshaw admits in his answer. They never refused to pay the Buckner debt, for it was never demanded of them.

And if they had refused, that refusal would not have prejudiced them; but they still would have saved their land, by application to equity. That debt was not of their contracting. It was *res inter alios.* They had a right to have it fully sifted in this court. No one can doubt this.

Again. If it were the case of vendor and vendee, before the vendor can count time and laches against the vendee, and go for a rescission, he must show himself ready and able to comply with his contract. Wilson *v.* Tappan, 6 O. Rep. 175.

Upshaw could not demand either money or land, until 1826, for he could never before that day make a title. And up to this moment he cannot perform that very contract, with which he is connected as assignee—the contract between Shackleford and Buckner. If these complainants are to pay the purchase-money for Buckner, they can only be asked to do so upon having the benefit of that contract and a performance from the other party. Shackleford stipulates to make Buckner a warrantee deed, and that deed Upshaw has not yet produced. If Shackleford is dead, we must have such a deed from his representatives as binds his estate. Upshaw's deed will not satisfy the contract. We do not know what he may have done to encumber the title, or how safe we would be with his warrantee. We are not bound to take it as of course.

Further, before Upshaw could rescind the contract and take the land, he must place us, as Buckner's assignees, in *statu quo.* He must give us the claim on Coats; he must transfer to us the claim on Buckner, and he must pay back to us the money he received from Buckner.

Lastly. The contract for the one thousand seven hundred acres is one; it must be rescinded *in toto,* or not at all; and as to the one thousand acres it can never be rescinded, for that part of it is performed.

III. If the court require the complainants to pay the Buckner debt, a question arises, whether a *pro rata* allowance be made for the £600 paid by the Anderson bond.

It is clearly right to allow that credit. Shackleford sold to Buckner two tracts as one, for an entire consideration of £1020. The contract speaks of the two tracts; that is, the tract of one thousand acres, and of seven hundred acres, "as the one thousand seven hundred acres." There is no price fixed for one as distinct from the other; the sale is *in solido.* The £600 is paid and endorsed generally upon the contract. No application was made to one of the tracts by the parties at the time of the payment. Indeed, without the concurrence of both the parties, such special application could not be made. The contract did not admit it, for here was no case of two debts, or of two tracts of land, with distinct sums due for each. There was but one debt, due for two tracts of land, sold as one.

IV. As to the rents and profits and improvements.

If the court are of opinion that Upshaw is entitled to the land, the remaining question is upon that part of the decree of the Circuit Court which touches the allowance to be made to Upshaw for rents, and to the complainants for improvements.

The decree gives to the complainants their improvements made up to the year 1818, without interest; and to Upshaw the annual rents and interest from 1818 to 1840, by which, in addition to the land, now worth from $15,000 to $20,000, Upshaw recovers a decree against the complainants for $4762 30, being a little more than the balance due upon the Buckner debt!

We claim the true rule to be, to allow improvements up to the time of bringing the ejectment upon which the land was recovered, and to charge rents from that time.

This is according to the rule fixed by the occupying claimant law of Ohio.

It is said that law does not apply to this case, as the title of the complainants is not adverse to that of Upshaw.

It is shown that the complainants took the possession under a claim of the fee, having paid their vendor in full, and taken a conveyance in fee. They did not hold in subordination to any one. Their possession was therefore adverse. Jackson *v.* Ellis, 13 Johns. 118. The occupying claimant law, therefore, furnishes a rule of adjustment which this court will follow. Bank of Hamilton *v.* Dudley's lessee, 2 Peters, 526.

Morehead and *Cox* argued for the appellee upon the following grounds.

The appellants have not sustained by proof the material allegations in their bill.

1. The appellants in their bill charge that Shackleford was authorized by the appellee to sell the land to Buckner; the answer negatives the allegation, and there is no proof contradicting the answer.

2. The appellee, however, admits that in 1800 he gave his conditional assent to that sale; and if the condition had been complied with on the part of Buckner, his assent would in equity be construed as having relation back to the time of Shackleford's contract with Buckner, and have bound him to convey the land. The conditions on which his assent to that contract was obtained are, Shackleford agreed to assign him the contract made with Buckner, and give him full power and authority to receive from Buckner the £420 then due for the land, with interest thereon, at the rate of 5 per cent. per annum, from the 1st day of December, 1797, till paid, and Buckner was to pay him the money thus due; and, on those conditions being complied with, the appellee assented to the sale, and bound himself to convey the land to Buckner.

3. The conditions on the agreement to perform which the assent of the appellee was obtained, as aforesaid, so far as the same were to have been performed by Shackleford, were never performed by him until the 16th of May, 1803. Until those conditions were performed by Shackleford, the appellee had no

power or authority to apply to either Buckner or Coats for payment, or to receive and receipt for the purchase-money, if the same had been tendered to him. The written order on Copeland, which Buckner gave to Shackleford, to which we have already referred, was never transferred by Shackleford to the appellee; so that the appellee never had any thing to do with the collection of Coats's bond, or any authority to receive the money due thereon, had it been collected.

4. That part of the condition, namely, the payment of the £420, with interest, &c., which was to have been performed by Buckner, has never been performed, either by him or by any other person for him. The payments credited on the contract between Shackleford and Buckner, while the same remained in possession of O'Bannon, were never received by the appellee. O'Bannon had no authority from the appellee to receive from Buckner partial payments on the contract. His authority was limited and confined to the receipt of the entire sum due and the delivery of the deed. The allegation in the appellant's bill, that O'Bannon was duly authorized by John H. Upshaw. whom they charge was invested with power of substitution, to receive from Buckner partial payments on said contract, is positively denied by the appellee in his answer, and that denial is fully sustained by the depositions of John H. Upshaw and the receipt given by him to the appellee, for the said original contract left with O'Bannon, and power of attorney dated April 4, 1804, to which the court is respectfully referred. From that denial, and those depositions and receipts, we draw these conclusions: 1st. That the appellee executed a deed to Buckner, as an escrow, and placed the same in the hands of his agent, John H. Upshaw, for the purpose of being delivered to Buckner, upon the receipt from him of the £530 9*s*., the purchase-money then due on the land. 2d. That, for the purpose of avoiding any difficulty with Buckner respecting the conveyance of said land, the appellee empowered his said agent, on the receipt of the said purchase-money, to execute to Buckner such other or further conveyance or assurance as might be deemed necessary, in order to invest in Buckner a perfect title. 3d. That said agent was not empowered to receive partial payments on said contract, but was limited and confined to the receipt of the entire sum due. The words in the

power referred to in said receipt are, "and to receive of said Buckner the sum of five hundred and thirty pounds," &c., "for the above land." The appellee was willing to confirm the contract upon being paid the entire sum due, but not otherwise. He was not, by the receipt of partial payments, willing to extend the time of payment of the residue to an indefinite period. 4th. That said agent was not, by his principal, invested with power of substitution. This is inferrible from the fact that no such power is referred to in the receipt which he gave to his principal. 5th. That the power given to said agent by his principal does not contain, as charged in the appellant's bill, a clause authorizing him to receive any balance that might be due on said contract, if any was due. 6th. That the power given by said agent to O'Bannon was not greater than said agent himself possessed; for said agent deposes and says, "I certainly did not consider myself authorized to tender Buckner a title until the money was paid, and I certainly did not give to O'Bannon a power greater than the one possessed by myself." And, 7th. That O'Bannon was not the attorney of the appellee for the purposes charged in the appellant's bill. If these conclusions are sustained by the premises, it results that O'Bannon had no power derived from the appellee to receive partial payments on the contract, and that the credits endorsed on said contract by him must be laid out of the case. The *onus* of sustaining O'Bannon's authority to receive partial payments rests with the appellants, and they have totally failed in proving the truth of their allegation. The credits endorsed on the contract refer to receipts given to Buckner. The appellants claim under Buckner; why, then, if those payments were made on said contract by the authority of the appellee, do not the appellants produce those receipts, and the authority, granted to O'Bannon, authorizing him to receive those partial payments? The appellants have presented no valid excuse for their non-production; and the very fact of keeping back those documents, if such really exist, raises a suspicion that all was not right, and that, if they were produced, they would prove the allegations in their bill to be untrue. The two payments endorsed without the authority of the appellee must, therefore, we respectfully submit, be laid out of the case.

The £600, the proceeds of Anderson's bond, was applied in

payment of the money due by Buckner to Shackleford on the one thousand acres of land surveyed for Javin Miller, and which was sold by the latter to the former, as aforesaid, and no part of that sum was applied in payment of the lands in question. This position is sustained from the following facts and circumstances:

1st. Shackleford, at the time he contracted with Buckner, was invested with the equitable title to this one thousand acres, but he was not invested with either the equitable or legal title to the seven hundred acres of land in question, and it is therefore reasonable to infer that he applied that sum to the payment of the debt due to himself.

2d. £600 was the precise sum which was to be paid by Buckner to Shackleford for that one thousand acres of land.

3d. In 1803, Shackleford procured Chamberlayne, the patentee of said one thousand acres of land, to execute a deed of conveyance for the same to Buckner, and the said deed and the patent which Chamberlayne had obtained for the land were afterwards transmitted to Buckner, by the hands of the appellee or his agent, John H. Upshaw. Would Shackleford have done that if any portion of the purchase-money still remained due to him by Buckner?

4th. When Shackleford, in 1800, first informed the appellee that he had sold to Buckner the seven hundred acres of land in question, and agreed to assign to him the contract he had made with Buckner, he stipulated with him that the entire purchase-money was still due for the land by Buckner.

5th. When Shackleford, in 1803, assigned to the appellee the contract he had made with Buckner, (for the sale to him of the lands in question,) he covenanted with the appellee that there was then due by Buckner, on said contract, the sum of £530 9*s*.

6th. When John H. Upshaw, as agent of the appellee, afterwards called upon Buckner for payment, he acknowledged that the entire sum was due, and promised to make payment in some short time, if said agent would wait. The said agent did wait, as requested, but no payments were made to him by Buckner.

We therefore assume it as an indisputable fact, that no part of the purchase-money for the lands in question was ever paid by Buckner, either to Shackleford or to the appellee, or to any other person authorized by the appellee to receive and receipt for the

same. No money was ever collected, either by Shackleford or the appellee, on Coats's bond. The defence successfully made by Buckner in the Circuit Court of Kentucky to the action brought by the appellee, as assignee, to recover the purchase-money due on the land, evinced a determination on his part not to perform the contract he had made with Shackleford, and, by that unequivocal act, the appellee had a right to declare the contract at an end, and no further obligatory on him; and he did so declare it, and immediately thereafter commenced an action of ejectment in the seventh Circuit Court of the United States, district of Ohio, against the tenants in possession, who claimed to have derived their title under Buckner. To that action, the appellants, or the persons under whom they claim, were admitted as defendants, and, on trial, a verdict and judgment were rendered in their favour, on the ground that the appellee, who was the lessor of the plaintiff, was only invested with the equitable title, under and in virtue of the deed to him from Roy, which was based on a patent granted to him by the commonwealth of Virginia, which bore date subsequent to the date of the deed of cession from Virginia to the United States. Being thus defeated in every attempt made by him, first, to recover the money for which the land had been sold by Shackleford to Buckner, and, second, to recover possession of the land itself, the appellee procured from Roy and wife a second deed of conveyance, and, in 1826, obtained from the United States a patent for the land, on which he instituted an action of ejectment against the appellants, and obtained a verdict and judgment of eviction against them; and in order to obtain a perpetual injunction against further proceedings on that judgment, and to compel a conveyance of the lands in question, the appellant filed the bill under which the decree complained of was rendered.

5. And the question here occurs, were this a suit prosecuted by Buckner or his legal representatives against the appellee, in order to compel the specific execution of the contract entered into between Shackleford and Buckner, for the sale and conveyance of the lands in question, would this court grant the relief asked? Buckner has neither paid nor tendered payment of the purchase-money. Would this court, then, decree in his favour? Is it not a rule in equity, that where the party to a contract not only neg-

lects to perform it, but, by his conduct, evinces a determination not to perform it, that the opposite party is at liberty to put an end to it; and that where the purchaser neglects for an unreasonable length of time, although often requested, to pay the purchase-money, and in the mean time, as in the present case, the land has increased in value tenfold, that a court of equity will not interpose in his behalf, by compelling the specific execution of the contract? If Buckner had made prompt payment, the appellee could readily have invested the avails of the sale in other western lands, which, at this day, would have been worth thousands of dollars more than the lands in question, with all the improvements which have been made on the lands by the appellants, and have avoided the trouble and expense of many long and wearisome journeys, and the expenditure of thousands of dollars in ineffectual attempts to recover his just rights. Is it not also a rule in equity, that he who asks must himself do equity to him against whom he asks it; and that he who claims the aid of a court of equity must show that he has not only been at all times ready, willing, anxious, and eager to perform the stipulations on his part, but that he has either actually performed or tendered performance on his part, and that the opposite party refused compliance on his part? These principles are so well understood, and have so often received the sanction of this court, that we do not deem it necessary to cite authorities in support of them. We therefore respectfully submit, that were Buckner or his heirs the parties complainant in this suit, that a specific execution of the contract in question would not be decreed by this honourable court.

6. Do the appellants, as against the appellee, stand upon more favourable ground in a court of equity than Buckner or his representative would have stood? No consideration ever moved from the appellants to the appellee as an inducement to the conveyances asked; they never tendered, nor do they, in their bill, offer to pay the consideration money contracted to be paid by Buckner. They were not parties to the contract made by Shackleford with Buckner, and consequently no privity of contract exists between them and the appellee. Upon what ground or principle, then, are the appellants, as against the appellee, entitled to the relief prayed for in their bill? Upon the ground of privity of

contract, they are not entitled to relief, because such privity existed. The appellants have, however, invoked the benefit of the contract between Shackleford and Buckner, which has been assigned to the appellee; but can that contract, if it were admitted they are entitled to its benefit, aid them? The terms of that contract were never performed by Buckner. If they are entitled to the aid of that contract, it must be on the ground, that in equity, though not at law, they must be considered as Buckner's assignees, and consequently, in reference to that contract, as standing in his shoes; and with reference to the appellee, as subject to the same equity to which it was subject in the hands of Buckner. As the assignees of Buckner, they acquired no better title in equity than was vested in Buckner at the time of the assignment. If, therefore, Buckner could not in equity compel the specific execution of the contract in question, neither can the appellants compel it. The assignee of a contract for the sale and conveyance of land, where he himself has neither performed nor tendered performance, must abide the fate which awaited the assignor, where he neither fulfilled nor offered to fulfil the terms of the contracts, the specific execution of which is sought. In Stanley *v.* Gadsby, 10 Peters, 522, this court is reported to have said, "If a complainant does not aver in his bill his readiness to pay both principal and interest, he can have no standing in a court of equity." The payment or tender of the purchase-money is indispensable on the part of him who asks the specific execution of a contract. Stratford *v.* Alborough, Ridgeway's Ch. R., and 2 Bligh's R. 596, 4. Again: both Buckner and the appellants have trifled with the appellee; and it seems to be a settled rule in equity, that where one party to an agreement trifles, and shows a backwardness to perform on his part, equity will not decree a specific performance in his favour. Harrington *v.* Wheeler, 11 Ves. 856. In the case of Edwards *v.* Parker, lately pending in Brown county, Ohio, which was a bill to enforce the specific execution of a contract, the Supreme Court of the state refused to decree in favour of the complainant, on account of the lapse of time since the contract should have been complied with. S. P. Mayo *v.* Deschamps, 13 Ves. 25; Grant *v.* Humphrey, 8 Ves. 815; and Highby *v.* Whittaker, 8 Ohio, 201. In this last case the purchaser of the land delayed payment of

the principal part of the purchase-money for about ten years after it was due, and the court decided that he could not compel, in equity, the specific execution of the contract; that the trifling indisposition of the complainant, his want of integrity and intention to pay for the property, and his utter inability to do it, unquestionably gave to Burchard, under whom Whittaker claimed, the right to put an end to the contract; and that as the complainant had occupied the land sold, the fair rent of which was equal to the actual payment made, Brunce, the seller, had a right to rescind without offering to refund the amount received. See, also, Remington *v.* Kelly et al., 7 Ohio R. 103. It is now more than forty-one years since the purchase-money for the lands in question fell due, and during that whole period neither Buckner nor the appellants have either paid or offered to pay the purchase-money; upon what ground, then, can they insist that the decree is erroneous? Every man is to suffer for his own delay or neglect. Speake *v.* Speake, 1 Ves. 217. The plaintiff in equity, if he either will not, or, through his own negligence, he cannot, perform the whole on his side, has no title in equity to the performance of the other party. Butcher *v.* Hinton, 1 Ch. Ca. 302; Keen *v.* Stukely, Gil. R. 155; Pope *v.* Roots, 7 Bro. P. C. 184; Earl of Evershap *v.* Watson, Rep. Temp. Finch, 445; 2 Freeman, 35; Hutton *v.* Long, Temp. Finch, 12. So, if the plaintiff has not performed his part of the agreement, he must, in equity, show that he was in no default in not performing it, but must also allege that he is still ready to perform it. Fields *v.* Hooker, Merivale, 224; and Fane *v.* Spencer, Merival , 430, in note. And upon this reasoning it is, that when a man has trifled or shown a backwardness in performing his part of the contract, equity will not decree a specific contract in his favour, especially if circumstances are altered. Hayes *v.* Caryll, Jan. 1792; 5 Vin. Abr. 538, pl. 18. Neither will equity decree an agreement which appears afterwards to have been discharged by parol, though the original agreement was in writing. Gorman *v.* Salisbury, 1 Ves. 240; Lord Milton *v.* Edgworth, 6 Brown, P. C. 580; Segal *v.* Miller, 2 Ves. 299; Inge *v.* Sippingwell, Dick. 469; Daved *v.* Simonds, 1 Cox's R. 406; and Stephens *v.* Cooper, 1 Johns. Ch. R. 420, 430. In the case of Heafly *v.* Hill, the specific performance of an agreement to grant a lease was refused,

the plaintiff having failed to file his bill for more than two years since notice from defendant of his intent not to perform his contract, on account of the plaintiff's non-fulfilment of his part of the agreement. In this case, at the time of service of the declarations in the first action of ejectment brought by the appellee against the appellants, the appellants had notice that the appellee did not intend to perform the agreement in question, on account of the neglect of Buckner in not paying the purchase-money due on the land; and yet no payment or offer of payment was made by them, nor did they file their present bill until more than ten years had elapsed after the receipt of actual notice that the appellee considered the contract at an end, and no further obligatory on him. Even in the bill which the appellants have filed, (but which they never filed until all their efforts to baffle the appellee at law had failed,) they have not tendered payment of the purchase-money, unless that clause in the prayer of their bill which asks for a decree upon such terms as the court may seem just can be construed as an offer to pay the purchase-money due, with interest. To construe that clause in the prayer of the bill as an offer to pay would be giving to it a construction which is incompatible with the general frame of the bill, and the grounds on which the appellants have based their right to the relief invoked. The appellants have based their right to relief on three grounds: 1st. That Shackleford, or the appellee, neglected to collect the amount due on Coats's bond. 2d. If that be not true, that they, or one of them, neglected to collect the purchase-money of Buckner. And, 3d. That the appellee never acquired his legal title until 1826. And, first, as to Coats's bond: Were it true, as charged, that it was through the mismanagement or omission of Shackleford, or the appellee, or both of them, that Coats's bond was not collected, would the condition of the appellants be improved thereby? We think not. The balance due on Coats's bond was £250, and the entire sum due was £420. Consequently, there remained due, after deducting Coats's bond, £170, which fell due in 1799. This balance has never been either paid or tendered to the appellee. If, therefore, the balance of Coats's bond was lost through the negligence of Shackleford and the appellee, or one of them, that negligence only operated as a release *pro tanto* of the obligation of Buckner to pay, or tender pay-

ment of the purchase-money; and from thence it results, as the £170, with interest, was never paid or tendered, that the appellants are not entitled to the relief which they ask. But is it true that Shackleford and the appellee, or one of them, had the management of the claim against Coats; and that, through their mismanagement or neglect, or the mismanagement or neglect of any of them, said claim was lost? Coats's bond was never assigned by Buckner to Shackleford; nor did the parties stipulate that Shackleford should have the management or control of the suit which had been ordered on that bond. The stipulation on the part of Shackleford was to wait for the amount due on Coats's bond until judgment was obtained thereon. That stipulation was coupled with this condition, namely: that Buckner gave to him an order in writing, on the attorney in whose hands Coats's bond had been placed for collection, requesting him to pay over the money to Shackleford, when collected. Buckner did not give the written order which he covenanted to give, but gave to Shackleford an order of the description promised, on Copeland, who never was employed, nor ever had any thing to do in the collection of Coats's bond. Buckner's covenant was therefore broken; and so much of the purchase-money as was to have been paid by the proceeds of Coats's bond became due on the day the contract between Buckner and Shackleford was executed. But if this be deemed too rigid a construction of Buckner's undertaking, as it respects the order, in writing, he obligated himself to give to Shackleford, yet it is clearly discoverable from the words as well as from the general scope and design of the parties, as expressed in the contract, that Shackleford only stipulated to wait for the £250 until judgment was rendered on Coats's bond. That judgment was rendered in May, 1800, and on that day, at all events, the remaining balance of the purchase-money of the lands in question fell due. Buckner was informed by Shackleford when judgment would be rendered, and that Coats intended to enjoin the judgment. The evidence shows that neither Shackleford nor the appellee had any management or control of the suit on Coats's bond; that neither of them were guilty of any mismanagement or neglect in relation thereto; that the attorney having the management of that suit procured judgment to be rendered thereon at as early a day as practicable; that,

after judgment, every reasonable effort was made to enforce collection, but without effect; that the insolvency of Coats was ultimately ascertained; that, from weighing the evidence with care, the inference is strong that Coats was insolvent in 1797, and that Buckner was duly notified of the result. We therefore respectfully submit, that the first ground assumed by the appellants, on which they assert their claim to relief, has no solid base on which to rest. Their second ground is equally unsustainable. What has the solvency or insolvency of Buckner, at certain periods, to do with this case? He stipulated with Shackleford to pay for the land a certain amount, and within certain periods—uncertain, it is true, at the time of contracting, but which were rendered certain by the happening of the events referred to in the contract. Shackleford waited until those events happened. The £170 fell due at all events in 1799, if not before, and the £250 in the May following, when judgment was rendered on Coats's bond. Shackleford did not stipulate to wait for the purchase-money longer than those periods. If not paid then, he had a right to put an end to the contract. There is no clause in the contract which required him to sue for the purchase-money in case Buckner failed to pay within the stipulated periods. It was therefore optional with Shackleford, on Buckner's neglecting or refusing to pay within the stipulated periods, either to put an end to the contract or to sue for the money due. If Buckner was able to pay, why did he not pay? Until he made payment, the equitable title to the land purchased, or rather contracted for, did not vest in him. There was no consideration to raise a case in him. If he was able to pay, why did not the appellants compel him to make payment? Why did they not see that the money they had contracted to pay Buckner for the land was applied to the payment of the purchase-money which Buckner had contracted to pay Shackleford? The appellants claiming under Buckner are chargeable with notice of the fact, that he only held title under his contract with Shackleford, which obligated him to pay £420, with interest, before he could demand of Shackleford the legal title. Was it not, therefore, their duty to have seen that the purchase-money paid by them was faithfully applied to the payment and discharge of Buckner's contract with Shackleford? Buckner's solvency or insolvency has therefore nothing to do with

the case. The consideration has never been paid or tendered, and consequently the appellants have no right in equity, as against the appellee.

But it is also insisted that the appellee never acquired the legal title to the lands in question until 1826; and consequently, until he did acquire the legal title, that neither Buckner nor those claiming under him were bound either to pay or tender the purchase-money. But did they either pay or tender the purchase-money when the legal title was obtained? No; they neither did the one nor the other. How, then, are they entitled to relief on that ground? They did not offer to do equity when every shadow of suspicion was removed from the appellee's title. But did the defect in the appellee's legal title excuse them from the strict performance, or at least a tender of performance, of the original contract between Shackleford and Buckner? We think not. The appellee's equitable title was perfect, and he, as well as Shackleford and Buckner, believed that he was also invested with the perfect legal title, in virtue of the deed of conveyance from Roy, who had obtained a patent for the land from the state of Virginia. The attorney who instituted the first action of ejectment for the appellee, and the appellee himself, must have been impressed with the belief that the appellee was at that time invested with the legal title, otherwise the conduct of the attorney was dishonourable and dishonest, and that of the appellee simple and foolish. Upon comparing dates, it was found that the patent had issued since the date of the deed of cession, and consequently that the appellee was not invested with the legal title. Did that discovery excuse the appellants from paying or tendering the purchase-money, in pursuance of the terms of the original contract? The appellants either did or did not know, at the time the purchase-money fell due, that the appellee was not invested with the legal title. If they did know, it was their duty to have tendered the money, demanded a good title, and, at the same time, to have informed the appellee of the defect which existed in the title; and, on the other hand, if they did not know of the defect, they have no excuse for the neglect in making payment. The appellants have presented no valid excuse for the nonpayment or tender of the purchase-money, and consequently are not entitled to the relief claimed.

The conduct of the appellants, evinced by the institution and prosecution of their separate suits, in Clermont county, against the appellee, to which we have referred in the abstract, at the time this suit was pending in the Circuit Court, does not present them or their case in the most favourable point of view before a court of equity. He who asserts a claim in a court of equity ought to present himself with clean hands and a pure heart, if he expects to receive a favourable response to his petition.

Mr. Justice CATRON delivered the opinion of the court.

This is an injunction bill, to restrain the defendant from taking out a writ of possession and an execution for costs, on a recovery, of seven hundred acres of land, by Upshaw, in an action of ejectment against the complainants in the Circuit Court of Ohio. They ask a perpetual injunction of the execution, and a specific decree for title.

The complainants, and those under whom they claim, purchased from Philip Buckner, paid a full price, and took deeds dated in 1798 and 1799.

Buckner purchased from Lyne Shackleford in November, 1797, when the latter had no title to, or interest in the land; Upshaw, the respondent, being the owner. It had been granted to Beverly Roy by the commonwealth of Virginia, in 1789, and sold by Roy to Shackleford. In April, 1797, Shackleford sold to Upshaw, and directed the title to be made to him. On the 20th of July, 1797, Roy conveyed to Upshaw; and in November afterwards, Shackleford sold a second time to Buckner.

To remedy this defect of title and want of good faith, in April, 1801, Shackleford entered into a covenant with Upshaw, by which the sale to Buckner, of November, 1797, was confirmed; and in May, 1803, Shackleford and Upshaw entered into another covenant, again confirming the contract between Shackleford and Buckner; and which is more specific in its terms than the first, of 1801.

By these contracts alone Upshaw was bound: and on them the bill is founded, and a specific decree asked. They must be taken together: so the complainants treat them in their bill; nor can the court do otherwise.

Upshaw, having stipulated to make title to Buckner, on receiving £420, the purchase-money, took an assignment of the cove-

nant between Buckner and Shackleford; on which it appears by the covenant of 1803, £420 was remaining unpaid.

It is insisted that a bill for a specific performance of the contracts, could not be maintained until the purchase-money was tendered to Upshaw, the vendor; and of this opinion was the Circuit Court; and principally on this ground, taken in connection with other circumstances, dismissed the bill.

We are of opinion that if such a rule exists in any case, it has no application to the one before us. The complainants purchased from Buckner when he had no interest in the land; and at that time they acquired no equity against Upshaw: yet of this fact they had no knowledge, and rested confident that they were occupying and improving the land under a good title. Nor did they have any knowledge of the contracts between Shackleford and Upshaw, after their purchase from Buckner, for many years; probably not until about the time the recovery was had against them in the action of ejectment in 1831. It was not Buckner's interest to give the information; and Shackleford took no further trouble on himself in the matter after 1803; he and Upshaw residing in the remote parts of Virginia, five hundred miles from the complainants.

Upshaw admits, in his answer, that he did not know Buckner had sold the land; or that it was in the possession of the complainants, until about the time he brought his first action of ejectment, in October, 1818: that he sued for the land, because he had failed to obtain the purchase-money from Buckner. The suit failed, because the patent from the commonwealth of Virginia was void; the country having been ceded (north of the Ohio river) by Virginia to the United States, before the land was granted.

In 1826, Upshaw, on the production of the patent to Roy and his deed, obtained a patent from the United States, in confirmation of the Virginia grant. On this he brought another suit against the complainants; and in 1831, recovered the land. This is the judgment the bill seeks to enjoin.

During all this time, Upshaw was a stranger to the complainants: he set up no claim against them for the purchase-money due from Buckner to him: he sought the land, and disavowed that Buckner's contract with the complainants bound him. And

so he continues to do. His principal defence in the answer to the bill is, "That having no contract, or privity of contract, with the purchasers from Buckner, he conceives they can have no right to come into a court of equity to enforce a specific performance of the contract with Buckner."

It is manifest that at no time were these complainants afforded the opportunity to pay the purchase-money due from Buckner to Upshaw.

We therefore hold, that complainants were in no default prejudicial to their original equities, for failing to discharge, or offering to discharge, the bond of Buckner.

Nor could the complainants be justly charged with sleeping on their rights, had the true state of the facts been known to them. Until 1826, Upshaw was in no situation to comply with his part of the contract; that is, to make title. A court of chancery would have enjoined the payment of the purchase-money before the patent issued from the United States—and set aside the contract, if the vendor could not have made title.

Neither can this be treated as a stale claim, for another reason. The complainants went into possession under Buckner's deeds, dwelt upon, and in good faith improved the land; and are now seeking to protect their possessions and homes, in affirmance of their deeds.

We also hold that there was privity of contract between Upshaw and the complainants. When he sanctioned Shackleford's contract with Buckner, he became a party to it: Buckner had assigned all its benefits to the complainants, and they must be treated as rightful assignees; with the modifications imposed by the contracts of 1801 and 1803, between Upshaw and Shackleford.

The equitable title being in the complainants by a contract complete in all its parts, they are entitled to a specific decree of course, on principles too familiar to require authorities to support them. On this part of the case the court has had neither doubt or difficulty in arriving at a conclusion favourable to a specific decree.

The complainants being entitled to relief, the next question is, on what terms? For as they ask the active aid of the court to coerce performance of the respondent's contracts, they can only have such aid on the terms that they do him equity. A rule

without an exception, within our recollection. Having dealt for an equitable title, complainants took it subject to all the equities existing between their immediate vendor, Buckner, and his vendor, Upshaw It follows, they must perform the covenants favourable to the defendant found in the contracts on which they seek relief. Therefore, before Upshaw can be compelled to convey the land, he is entitled to receive the purchase-money; unless his right is cut off by the contract, or has been forfeited by his subsequent conduct.

The first objection is, that in the contract between Shackleford and Buckner, there is a power given to the latter to sell; until which time Shackleford agreed to wait for a portion of the money: that is, as to £170; provided the resale was made by the 1st of January, 1799: before which time, the sale was made to some of the complainants. It is true in the nature of buying and selling, that where a power of resale is given to the vendee, he has conferred on him the corresponding power to receive payment. But this could not affect Upshaw's title: Buckner took no interest by his contract with Shackleford; nor did the complainants acquire any by their purchase from Buckner. Their equities originated with Upshaw's sanction, given after the power had expired. He might sanction the contract of Shackleford with Buckner, or not, at his election; and, of course, modify it to suit his own interest. Having the transaction in his power, he saw proper to become a party to the contract on the terms that he retained a lien on the land for the £420: First, by the covenant of 1801, he bound himself to Shackleford, to proceed against the land if he failed to receive payment from Buckner: and, Secondly, by that of 1803, he bound himself to convey to Buckner on being paid the £420. The bill being founded on these contracts, Upshaw is entitled to be paid the purchase-money, irrespective of the stipulation that Buckner was authorized to resell, by his contract with Shackleford.

In the covenants of 1801, and 1803, Upshaw admits that Shackleford sold to Buckner with his consent, and it is insisted for complainants that Upshaw must be held to have authorized Shackleford to sell before the contract of 1797 was made. All the evidence we find in the record of Upshaw's sanction, is found in the contracts of 1801, and 1803; by these he was not bound to convey until he received payment for the land; we think in this modi-

fied form is Upshaw bound, and that he never intended simply to sanction Shackleford's sale to Buckner.

Next it is contended, respondent was negligent in not collecting a bond upon Coats, on which £250 was due. Upshaw's covenants have no reference to this security. It was delivered over to Shackleford by Buckner for collection; credit was to be given for the money, if collected, on Buckner's bond. The claim was diligently pursued, but Coats proved insolvent: so that there is nothing in this objection.

Again, it is contended, and with much force, that Upshaw was grossly negligent in failing to collect the £420 from Buckner. He received Buckner's covenant in 1803. In 1804, it was sent by John H. Upshaw from Virginia to Kentucky for collection; the agent was fully authorized to receive the money and to make title to the land on its payment; which Buckner evaded, and the contract was put into the hands of another agent, O'Bannon, who collected $200 from Buckner: and in 1814, Buckner was sued in Upshaw's name as assignee, and the suit failed because an assignee could not sue upon such an instrument. During this time, Upshaw had no valid title to the land, although there can be no doubt he thought the Virginia patent valid; still he could not have coerced payment from Buckner until 1826, when the patent from the United States was obtained; had the latter resisted payment on this ground. Under all the circumstances we think Upshaw did not forfeit his right to demand the purchase-money from the complainants.

Shackleford sold to Buckner two tracts of land; one of a thousand acres, and this in controversy of seven hundred acres, for the gross sum of £1020; and obtained £600 on Anderson's bond in part payment. It is insisted that this sum must be applied in discharge of the complainants, as seven hundred is to one thousand; and that they are only bound for the residue.

The complainants are compelled to rely on Upshaw's contracts of 1801 and 1803, to maintain their claim to relief, and to affirm them in all their parts. By these contracts it appears the seven hundred acre tract was estimated at £420, and that no part of the purchase-money for this tract had then been paid by Buckner: he was concluded from asserting the contrary, and so are the complainants.

The next question is, from what time are the complainants bound to pay interest on the unpaid purchase-money. They insist from the time Upshaw obtained his patent from the United states, in 1826. Respondent insists he is entitled to interest from the time the debt fell due against Buckner, or the 1st of January, 1799. Until the complainants were notified that, as purchasers of Upshaw's title, they were responsible to him for the purchase-money, and recognised as his debtors, they had no opportunity to make payment: as to them, the debt was payable on demand, express or implied. Respondent admits in the answer that he neither pursued the land, or the purchasers under Buckner, until he failed to obtain payment from the latter. His first assertion of claim, was by the suit in ejectment in 1818; after which the purchasers cannot be heard to say, they remained ignorant of the defects in their own title, or of Upshaw's rights; it was imposed upon them to trace up the outstanding equities favourable, and unfavourable. Had they done so, the contracts of 1801, and 1803, would have been discovered, and the state of the title explained: this complainants did in 1831; and it could have been done quite as conveniently in 1818. We therefore deem the suit equivalent to a demand.

That Upshaw had no legal title in 1818, is no excuse: The complainants entered upon, occupied, and enjoyed the fruits of the land, under his title; and could no more be allowed to disavow it while they remained in possession, than could a tenant for years, be permitted to disavow his landlord's title. So in effect, this court held in Galloway *v.* Finley, 12 Peters, 264. But being remote purchasers of Upshaw's title; not from him, but another; and only bound to pay the purchase-money by the rules adopted by courts of chancery; by the same rules, the complainants are entitled to an abatement of interest in part, accruing on Buckner's contract: and as the right to receive interest depends on the time when Upshaw notified them that they were held responsible for Buckner's failure to pay; and the action of ejectment, of October, 1818, being equivalent to a demand of payment, legal interest accrued from that date.

This we deem a well-founded principle, where a personal demand existed upon real security, and is brought forward at a late

day. Interest may be allowed at the discretion of the court, only from the time of filing the bill, in such cases. The rule is established in the Court of Chancery in England, and can be properly applied in this case. Pickering *v.* Lord Stamford, 2 Ves. jr. 272, 582. And under similar circumstances it equally applies where mesne profits are claimed. Acherly *v.* Roe, 5 Ves. 565.

We order that the $200 paid to O'Bannon be deducted from the £420; leaving $1200 due: on this sum interest will be allowed from the 15th of October, 1818, until paid. As the record does not show when the action of ejectment was brought, we assume the middle of the month as the true time; the interest to be after the rate of six per cent. per annum.

The purchase-money will be apportioned among the complainants, according to the original value of the several tracts when purchased from Buckner: and the price paid to him taken as the measure of value. Those claiming under Buckner's vendees, will be governed by the same rule, of their vendor's. If the money is not paid in a limited time, sales will be ordered, of all, or any of the tracts, at the discretion of the Circuit Court, to raise the money.

The injunction at law, in so far as to restrain the writ of possession, will be made perpetual: but will be dissolved as to the judgment for costs, so that an execution may issue to collect them.

The costs of this suit in the Circuit Court, will be equally divided between the complainants, and the respondent, Upshaw; they paying half, and he the other half: and the complainants will contribute among each other, in the same proportion that they are bound to do in discharging the decree for the purchase-money.

The appellee Upshaw will pay the costs of this court.

On the complainants discharging the purchase-money, the contract between Buckner and Shackleford will be assigned to them by Upshaw, if he is required to do so: and he will also be decreed to execute deeds to the complainants for the tracts they respectively claim, in such form, and with such covenants, as the Circuit Court shall direct.

The decree of the Circuit Court for the mesne profits, falls of course by the reversal of the principal decree.

ORDER.

Edwin Upshaw, Appellant,
v.
Buchannon and others.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the district of Ohio, and on the cross appeal by Edwin Upshaw, and was argued by counsel. On consideration whereof, it is now here adjudged and decreed by this court, that the said appeal of Edwin Upshaw be and the same is hereby dismissed, with costs.

Buchannon and others, Appellants,
v.
Edwin Upshaw.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the district of Ohio, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be and the same is hereby reversed with costs, and that this cause be and the same is hereby remanded to the said Circuit Court, with directions to proceed therein conformably to the opinion and decree of this court.

JONATHAN STROUT AND OTHERS, LIBELLANTS, &c., APPELLANTS, *v.* JAMES FOSTER AND OTHERS, CLAIMANTS, AND OWNERS OF THE SHIP LOUISVILLE.

If a ship be at anchor, with no sails set, and in a proper place for anchoring, and another ship, under sail, occasions damage to her, the latter is liable.

But if the place of anchorage be an improper place, the owners of the vessel which is injured must abide the consequences of the misconduct of the master.

In this case, the anchored vessel was in the thoroughfare of the pass of the Mississippi river.

THIS case originated in the District Court of the United States for the eastern district of Louisiana, was carried, by appeal, to the Circuit Court, and finally brought here.

There was much contradictory evidence about some of the facts. Those which were not disputed were these:

The Harriet, a ship of about three hundred tons, sailed from New Orleans for London on the 25th of May, 1836. On the 26th, she passed the bar of the Southwest pass, at the mouth of the river, and came to anchor. The ship Louisville, of five hundred tons burden or upwards, was coming in, and a collision ensued between the two vessels. The Harriet was so much damaged that she put back for repairs. Her owners, Jonathan Strout and others, libelled the Louisville. The District Court, after a hearing, decreed in favour of the libellants, and against the ship Louisville, her tackle, apparel, and furniture, in the sum of $2701 07, and costs of suit. The defendants appealed.

The Circuit Court reversed the decree of the District Court, with costs; and remanded the case to the District Court, with instructions to dismiss the libel. The libellants appealed.

It was given in evidence on the trial below for the libellants, that, on the 26th of May, 1836, the Harriet was at anchor near the mouth of the Southwest pass of the Mississippi, outside the bar, on the western side of it, with her sails all furled; that the Louisville was also lying at anchor with her sails furled, at some considerable distance to the eastward; that the Louisville got under weigh, and stood down to the Southwest pass with all sails set, topsail, and jib, and spanker; that she got within a quarter of a mile of the Harriet, and let go her anchor; that there was no range of cable overhauled; that there was not more than enough cable to let the anchor out of sight; that when the Louisville dropped her anchor, her sails were all set; that she came afoul of the starboard bow of the Harriet, whose helm was hard to starboard, and the jib and fore-top-mast stay-sail set to steer clear; that the people on board of the Harriet bore the Louisville off, and then she came afoul again; that they bore her off again; that instead of the Louisville making sail aft to bring her up, they set the fore-top-sail, and the ship paid off, and came afoul of the Harriet across her bows; that aboard the Harriet they continued to pay out cable, to permit the vessel to go clear; that there was plenty of room for the Louisville to have passed to the eastward of the Harriet, and a good free wind; that the Harriet was lying out of the usual track; that two brigs came down and

went to sea to the eastward of the Harriet, after she had anchored; and that the wind was fresh from the S. E. or S. S. E.

On the part of the defendants, it was given in evidence, that the Harriet might have gone to sea when she anchored, as there was wind enough; that she was lying in the thoroughfare of vessels going in and out; that when the Louisville weighed anchor to come in, there was a fresh wind and favourable for coming in; that as she approached the bar, the wind died away; that a strong current set out of the pass; that it was stronger than usual, in consequence of there having been a strong wiud the night before from the south; that owing to the lightness of the wind the Louisville drifted; that there was a pilot on board the Louisville, who said some time before, that they would be obliged to go close to the Harriet on one side or the other; that as the Louisville neared the Harriet, the pilot ordered them to let go the anchor and take in sail; that they obeyed the order as soon as they could; that the anchor got afoul of the chain of the Harriet, which had a great scope out; that the chain of the Harriet was not forward of her, but off on the starboard bow; that the Harriet had met with a similar accident in and about the same place, on a former voyage; that the entrances of passes at the mouth of the Mississippi are very intricate and difficult, on account of the currents and counter-currents; that as vessels approach the bar, and the water becomes more shoal, they are apt to become unmanageable, particularly when the wind dies away; that when the water is shoal, the under-tow has a great effect, and frequently with the greatest efforts a vessel cannot be steered; that there is one flood-tide every twenty-four hours on the bar, and the under-tow is the consequence of the flood-tide setting in and the current out.

The opinion of the Circuit Court, as delivered by Mr. Justice McKinley, was as follows:

This case comes before this court upon an appeal from the decree of the District Court for the eastern district of Louisiana.

The appellees, owners of ship Harriet, filed their libel, in the court below, for collision, and upon the trial the court rendered a decree in favour of the libellants, for $2701 7 cents. By the evidence it appears that the Harriet had passed over the bar through one of the passes or outlets at the mouth of the Mississippi river,

outward bound, on the 26th of May, 1836, and came to anchor near the bar. The Louisville, lying below a distance of several miles, weighed anchor with a fresh and favourable wind for coming in, through the same pass; as she approached the bar the wind died away, and the current being stronger than usual, owing to a strong wind from the south the night before, she drifted and ran afoul of the Harriet. These passes, it appears, are intricate and difficult to navigate, and subject to counter and under currents. If the wind die away when a ship is coming in, she is certain to drift and become unmanageable. Knowing these facts, a prudent master would never anchor his vessel in the thoroughfare of one of these passes. The evidence shows, however, that the master of the Harriet did anchor his vessel immediately in the thoroughfare, and that, too, after having been run afoul of by another vessel about a year before, at or near the same place.

There are four possibilities under which a collision may occur:

First. It may happen without blame being imputable to either party; as when the loss is occasioned by a storm, or any other *vis major*. In that case the misfortune must be borne by the party on whom it happens to light, the other not being responsible to him in any degree.

Secondly. When there has been a want of due diligence or skill on both sides, in such case the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both.

Thirdly. It may happen by the misconduct of the suffering party only, and then the rule is, that the sufferer must bear his own burden.

Lastly. It may have been the fault of the ship which run the other down, and in this case, the injured party would be entitled to entire compensation from the other. The Woodrop Sims, 2 Dodson's Rep. 83.

The third rule here laid down, it seems to me, applies with great force to the case under consideration, the misconduct on the part of the master of the Harriet, in anchoring his ship immediately in the thoroughfare, is fully made out by the proof; while, on the contrary, there is no fault proved, going to show mismanagement, want of skill, or negligence on the part of the master of the Louisville. It is true that the opinions of some

nautical men, found in the evidence, show that it was possible for the Louisville to have avoided the collision, had every thing been done that it was possible to do. But the law imposes no such diligence on the party in this case; so far as the Harriet was concerned, the Louisville was entitled to the full use of the thoroughfare of the pass; the master of the Harriet having obstructed it, with a full knowledge of the danger of doing so, has been guilty of such misconduct as to deprive the appellees of the right of action against the appellants. 3 Hunt's Con. 230.

It was insisted by the counsel of the appellees, that the Harriet being at anchor, and the other ship under sail, that the latter was therefore liable. It is true, if a ship be at anchor, with no sails set and in a proper place for anchoring, and another ship under sail occasions damage to her, the latter is liable. But the place where the Harriet anchored was an improper place, and therefore the appellees must abide the consequences of the misconduct of the master. Wherefore, it is decreed and ordered that the decree of the District Court be reversed, and held for naught, and that the appellants recover of the appellees their costs in this behalf expended; and it is further decreed and ordered, that this case be remanded to the District Court, with instructions to dismiss the libel of the libellants.

Dickins and *Hellen*, for the appellants.

Coxe, for the appellees.

The reporter was not present at the argument, and has been furnished only with the notes of Mr. Dickins.

Dickins laid down the following propositions:

1. The sea is a public highway or thoroughfare, equally free to all persons and all nations.

2. All persons navigating the high seas have an equal right to sail through, or anchor in any portion of them.

3. All persons navigating the high seas, as aforesaid, are bound to take notice of all such vessels as may have come to an anchor; and so to navigate their vessel as not to run afoul of, or otherwise injure those at anchor.

4. If a vessel under sail runs afoul of a vessel at anchor in the nigh seas, the vessel in motion is bound to pay all damages.

5. If the universal right of all vessels navigating the high seas to anchor in any part thereof has been restricted, either by law

or custom, and they are prohibited from coming to an anchor in certain places, unless at their own risk, it is incumbent upon the party claiming the benefit of such restriction or prohibition, to prove its existence clearly and conclusively; and also to prove, with equal clearness and certainty, the fact, that the vessel complained of was anchored in such prohibited place, and that all ordinary diligence was used by those on board of the vessel in motion, to prevent the accident; otherwise, they will not be released from the payment of the damages sustained by the vessel at anchor.

6. The universal right of all persons navigating the high seas to anchor wherever they may happen to be, or in any place they may think proper, has never been and cannot be restricted, but in certain particular local jurisdictions.

7, and last. If a vessel under sail comes unawares upon one at anchor, they are both bound to use every possible exertion to prevent a collision; and if either is deficient in that respect, it is bound to bear the loss: but should a vessel under sail knowingly and voluntarily attempt to pass one at anchor, and, in so doing, run afoul of her, and thereby cause her to sustain loss or damage, the vessel under sail, although she may have used every possible exertion to prevent the damage, but at a time when it was too late to avoid the collision, is bound to pay all the losses sustained in consequence thereof by the vessel at anchor.

In support of the fourth proposition, he cited Jacobsen's Sea Laws, (edition by William Frick, in 1818,) p. 339: "A ship, which, under full sail, occasions damage to another which has no sail set, is liable for all damages."

To sustain the fifth proposition he cited Lock *v.* Seward, 4 Carrington and Payne, 106; and Foot and Reynold *v.* Wiswall, 14 Johns. 304: and for the seventh, Jacobsen's Sea Laws, 107, art. 36; 1 Bell's Comm. 580; Story's Commentaries on Bailments, p. 385; 3 Kent's Com. 230; Story as above, 381, 382; Collinson et al. *v.* Larkins, 3 Taunt. 1; Haggitt *v.* Montgomery, 5 Bos. and Pul. 446; Verplank and another *v.* Miller and another, 1 Moody and Malkin, 69; Yates et al. *v.* Brown et al., 8 Pick. Mass. Rep. 83; Hawkins *v.* Dutchess and Orange Steamboat Company, 2 Wend. 452; Snell, Stagg and Co. *v.* Rich, 1 Johns. 305; Dodson's Admiralty Cases, 471, the case of the Neptune.

That all possible diligence should have been used by the Louisville, he cited Story on Bailments, 334; 3 Pardessus, 79, ¶ 652; 1 Wash. C. C. R. 142; Stone et al. *v.* Retland, 4 Martin's La. Rep. (new series,) 399; Martin et al. *v.* Blythe, 1 McCord, 360.

The court being equally divided, the judgment of the Circuit Court was affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the eastern district of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be and the same is hereby affirmed, with costs.

MAYOR AND ALDERMEN OF THE CITY OF MOBILE, PLAINTIFFS, *v.* J. EMANUEL AND G. S. GAINES, DEFENDANTS.

The case of the City of Mobile *v.* Hallett, 16 Peters, 261, examined and confirmed.

Under the exception contained in the act of Congress of 1824, no title passed to the city of Mobile, where the land was in the possession of a party claiming to hold it under a Spanish grant which had been confirmed by the United States.

THIS case was brought up by writ of error, from the Supreme Court of the state of Alabama, under the twenty-fifth section of the judiciary act of 1789.

The facts in the case were these:

On the 26th of September, 1807, the Spanish governor of Florida granted to John Forbes a tract of land immediately adjacent to what is now the city of Mobile, and indeed constituting a part of it. The grant was founded upon, and confirmatory of, an older one issued to Richardson in 1767, by the British government, then in possession of the country. The land was upon the west side of the river Mobile. In the document issued

by the surveyor-general, it is said to be "bounded on the east by said river;" and in that issued by the intendant, to be "terminated by the bank of said river on the east side:" in both, there is a reservation of a "free passage on the bank of the river."

On the 2d of March, 1819, Congress passed "An act to enable the people of the Alabama territory to form a constitution and state government, and for the admission of such state into the Union, on an equal footing with the original states," by the sixth section of which it was enacted, "That the following propositions be and the same are hereby offered to the convention of the said territory of Alabama, when formed, for their free acceptance or rejection, which, if accepted by the convention, shall be obligatory upon the United States." After enumerating many articles, the section concludes with this: "and that all navigable waters within the said state shall forever remain public highways, free to the citizens of said state and of the United States, without any tax, duty, impost, or toll, therefor, imposed by the said state."

By the original plan of the town a street was laid off, called Water street, on the margin of the river, running nearly north and south, which was afterwards filled up, and by the improvement the water, at high tide, was confined to the eastern edge of the street.

On the 26th of May, 1824, Congress passed "An act granting certain lots of ground to the corporation of the city of Mobile, and to certain individuals of said city," which is as follows:

1. "That all the right and claim of the United States to the lots known as the hospital and bakehouse lots, containing about three-fourths of an acre of land, in the city of Mobile, in the state of Alabama, and also all the right and claim of the United States to all the lots not sold or confirmed to individuals, either by this or any former act, and to which no equitable title exists in favour of any individual, under this or any former act, between high water-mark, and the channel of the river, and between Church street and North Boundary street, in front of the said city, be and the same are hereby vested in the mayor and aldermen of the said city of Mobile, for the time being, and their successors in office, for the sole use and benefit of the said city forever.

2. "That all the right and claim of the United States to so

many of the lots of ground east of Water street, and between Church street and North Boundary street, now known as water-lots, as are situated between the channel of the river and the front of the lots known under the Spanish government as water-lots, in the said city of Mobile, whereon improvements have been made, be and the same are hereby vested in the several proprietors and occupants of each of the lots heretofore fronting on the river Mobile, except in cases where such proprietor or occupant has alienated his right to any such lot now designated as a water-lot, or the Spanish government has made a new grant or order of survey for the same during the time at which they had the power to grant the same; in which case the rights and claims of the United States shall be and is hereby vested in the person to whom such alienation, grant, or order of survey was made, or in his legal representative.

"Provided, that nothing in this act contained shall be construed to affect the claim or claims, if any such there be, of any individual or individuals, or of any body politic or corporate." 7 vol. Laws of the United States, 318; 1 vol. Land Laws, ed. 1838, 398.

On the 8th of July, 1835, the mayor and aldermen of the city of Mobile brought an action of trespass to try title against Emanuel and Gaines in the state Circuit Court of Alabama, claiming several lots bounded on the west by Water street, and running eastward to the channel of the river.

On the trial of the cause, the jury, under the instructions of the court, found the defendants "not guilty" of the trespass. The court charged the jury "that if the place in controversy was, subsequent to the admission of this state into the Union, below both high and low water-mark, then Congress had no right to grant it; and if defendants were in possession, the plaintiffs could not oust them, by virtue of the act of Congress.

"That the grant to Forbes extended to high water-mark, and that if the place claimed was between high water-mark and the channel, in front of the grant, and had been reclaimed by the defendants; then the plaintiffs could not recover in virtue of the act of Congress, and this, notwithstanding the reservation of the right of way specified in the confirmation of the grant to Forbes."

Upon this charge a bill of exceptions was founded, and the case carried to the Supreme Court of the state of Alabama, where the judgment of the court below was affirmed.

It is necessary to refer to the opinion of the Supreme Court of the state of Alabama, in order to understand the ground upon which the dissentient opinion of Mr. Justice Catron is placed.

The Supreme Court of Alabama did not decide the first point raised in the bill of exceptions, viz., "that Congress had no right to grant the land to the city of Mobile." But being of opinion that the grant to Forbes conveyed to him the intervening space between high water-mark and the channel of the river, (covering the property in dispute,) and thus precluded the plaintiffs from ever recovering it; and being moreover of opinion, that a judgment ought not to be reversed for a misdirection of the judge to the jury, if it appears that the party complaining could not have been injured, that court waived all examination into the correctness of the first point, and contented itself with affirming the judgment of the court below.

Test, for the plaintiffs in error.

Sergeants, for the defendants.

Mr. Justice McLEAN delivered the opinion of the court.

This cause is brought to this court by a writ of error, to the Supreme Court of Alabama.

An action of trespass to try the title to a certain lot or piece of ground in the city of Mobile, was commenced by the plaintiffs against the defendants, in the Circuit Court of the state. Issue being joined, a jury were empannelled, who rendered a verdict of not guilty. As the right of the plaintiffs was asserted, exclusively, under an act of Congress, and the decision being against that right, the plaintiffs, having excepted to certain rulings of the court on the trial, prosecuted this writ of error, under the twenty-fifth section of the judiciary act of 1789.

The bill of exceptions states that it was proved the defendants were in possession of the premises described in the declaration, at the time the suit was brought.

An act of Congress, entitled "An act, granting certain lots of ground to the corporation of the city of Mobile, and to certain

individuals of said city," passed 20th May, 1824, was read: also "A resolution of the mayor and aldermen of the city of Mobile, passed the 23d day of April, 1834, in the following words: 'Resolved, that the map of the city as now shown to the board, be accepted and approved; and it is further resolved that the names of the streets be the same as heretofore established.'"

It was also proved by the plaintiffs that the map referred to was one published by Goodwin and Haise, a copperplate copy of which was offered in evidence; a copy of such parts of said map as is necessary to refer to is annexed.

It was also proved that there never had been a street in Mobile, known as North Boundary street. And also, that the premises in question were situate, in May, 1824, between Church street, south of Adams street, and below high water as well as low water-mark and the channel of the river. It was also proved that the premises were north of St. Louis street, as laid out in said map, and that in 1824, Water street did not extend to St. Louis street, and that at that time buildings were few and scattered above St. Louis street.

The defendant offered in evidence a grant from the Spanish government, and proved that they claimed title to the premises under that grant.

The court charged the jury that, if the place in controversy was, subsequent to the admission of this state into the Union, below both high and low water-mark, then Congress had no right to grant it; and if defendants were in possession, the plaintiffs could not oust them, by virtue of the act of Congress. That the grant to Forbes extended to high water-mark, and that if the place claimed was between high water-mark and the channel, in front of the grant, and had been reclaimed by the defendants, then the plaintiffs could not recover in virtue of the act of Congress, and this, notwithstanding the reservation of the right of way specified in the confirmation of the grant to Forbes."

It appeared that on the 9th January, 1767, the English government, being then in possession of the country, had granted the land in controversy to William Richardson; and that a grant of the same land was made to John Forbes and Co., the assignees of Richardson, by the Spanish authority, the 26th September, 1807. In the British grant the land "was bounded east by the

river Mobile," and by the Spanish "by the bank of the river," "leaving a free passage on the bank," &c.

The case was removed by writ of error from the Circuit Court to the Supreme Court of the state, in which judgment was affirmed.

The first section of the act of 1824, referred to in the bill of exceptions, vests "in the mayor and aldermen of the city of Mobile, for the time being, and their successors in office, for the sole use and benefit of the city, forever, all the right and claim of the United States to all the lots not sold or confirmed to individuals, either by that or any former act, and to which no equitable title exists in favour of an individual under that or any other act, between high water-mark and the channel of the river, and between Church street and North Boundary street, in front of the city."

And the second section of the act "excepts from the operation of the law, cases where the Spanish government had made a new grant or order of survey for the same, during the time at which they had the power to grant the same; in which case, the right and claim of the United States shall be and is hereby vested in the person to whom such alienation, grant, or order of survey, was made, or in his legal representative."

In principle this case is similar to that of the City of Mobile *v.* Hallett, 16 Peters, 261. In that cause the court say, "From the bill of exceptions, it appears, that the defendant was in possession of the land in controversy under a Spanish grant, which was confirmed by the United States; and that the land extended to the Mobile river. It was then within the exception in the act of 1824, and no right vested in the plaintiffs. We think, therefore, that the instruction of the Circuit Court to this effect, was right." The same language is equally applicable to the case under consideration. And it appears that the judgment of the Circuit Court was affirmed by the Supreme Court of Alabama, on the ground that "there was no vacant space between high and low water-mark; all having been sold and confirmed to Forbes," under his Spanish grant.

The Spanish grant being an exception in the act, under which the plaintiffs claim, the instruction of the Circuit Court in favour of the defendant was correct. The judgment f the Supreme Court of Alabama is affirmed.

Mr. Justice CATRON dissented.

The premises in controversy lie in front of the city of Mobile, and are claimed by the corporation, by virtue of the act of Congress, of May 20, 1824. They lie both below high and low water-mark.

The court charged the jury that, if the place in controversy was subsequent to the admission of this state into the Union, below both high and low water-mark, then Congress had no right to grant it, and if defendants were in possession, the plaintiffs could not oust them, by virtue of the act of Congress.

That the grant to Forbes extended to high water-mark, and that if the place claimed was between high water-mark, and the channel, in front of the grant, and had been reclaimed by defendants; then the plaintiffs could not recover in virtue of the act of Congress, and this, notwithstanding the reservation of the rights of way specified in the confirmation of the grant to Forbes.

To all of which charge the counsel of the plaintiffs excepted.

The jury found a general verdict of not guilty. As Alabama was admitted into the Union, December 14, 1819, the first instruction was conclusive of the plaintiffs' title. On the admitted fact, that the land lay under the water in 1824, the court pronounced the act of Congress void.

The second instruction depends on the fact, "whether the defendant had reclaimed the land in front of the grant of Forbes." There is no evidence in the record that he had done so; and all the evidence purports to have been set out.

A writ of error was prosecuted to the Supreme Court of Alabama. That court simply affirmed the judgment of the Circuit Court: and from that affirmance a writ of error was prosecuted to this court, by the corporation of the city of Mobile, under the twenty-fifth section of the judiciary act.

One error assigned in the Supreme Court of Alabama, was, "That the charge of the circuit judge denies, that the United States had right and power to grant the premises in question."

On the general affirmance, can this court take jurisdiction and reverse, because the first instruction was erroneous. In the case of the same plaintiffs against Eslava, 16 Peters, 246, the majority of the court held, that the opinion of the Supreme Court of Alabama certified as part of the record, was no part of it.

Speaking of the opinion, the court says: "Their opinion constitutes no part of the record, and is not properly a part of the case. We must look to the points raised by the exceptions in the Circuit Court, as the only questions for our consideration and decision."

And so this court held, in even a stronger case, (Gordon *v.* Longest, 16 Peters, 103,) where there had been a general affirmance of the judgment below, by the Supreme Court of Kentucky.

In Eslava's case, I thought the opinion of the Supreme Court of Alabama formed part of the record: in that case, as in this, the opinion was found in the paper book; but a majority of the court ruled it out, as no part of the record; to which decision I submit, of course.

Looking only to the points raised by the exceptions in the Circuit Court, and we find it established with a plainness admitting of no doubt, that Alabama claims to hold as her own; and does actually hold, by force of her judicial decisions, all the lands within the state, flowed by tide water: and that this claim is founded, on an implied cession of the lands under tide water, by the United States to Alabama, as a consequence of the sanction given by Congress to the state constitution. The disastrous results of this assumption on part of the state courts of Alabama, I endeavoured to point out, (so far as pressure of circumstances would permit,) in my opinions in the cases of these plaintiffs against Eslava and Hallet, 16 Peters, 247 and 263.

That the United States had the undoubted title before the adoption of the constitution of Alabama, has never been denied by any one; and that the state acquired title by that event has not been proved, nor can it be, as I think: nor is it perceived how the question can be avoided in the cause before us, unless we look beyond the record. I therefore believe the judgment should be reversed because there was error in the first instruction. For my reasons I refer to the opinions in the cases of Eslava and Hallet. To these I will add, that it is impossible for this court to follow the decisions of the Supreme Court of Alabama, without overruling the decision in Pollard's heirs *v.* Kibbie, 14 Peters, 353. William Pollard claimed a square of land below high water-mark fronting the city of Mobile: the claim was founded originally on a Spanish concession, made in 1809. This

was merely void, as was held in Foster and Elam *v.* Neilson, 2 Peters, 254, and in Garcia *v.* Lee, 12 Peters, 511. By the 2d sec. of the act of 1824, the land was excepted from its operation and did not pass to the city of Mobile. 14 Peters, 364, 365, 366. The title to the square claimed by Pollard therefore remained in the United States until it was granted to his heirs, by a private act of Congress, of 1836, and a patent founded on the act, dated in 1837. This court maintained the title, and a recovery was had on the act of 1836, and the patent from the government.

If the act of 1824 is void, because Congress had no power to grant the lands below the flow of the tides; so is equally, and as certainly, the act of 1836, and the patent founded on it.

Forbes owned the land, in front of the land granted to Pollard's heirs: Forbes's grant extended to high water-mark; was dated in 1802; and was undisputed. This court held in effect that it was bounded, and could not extend by implication beyond the high water-mark. So is the undoubted construction of grants for lands fronting tide waters. A grant of lands on each side of an arm of the sea, and embracing it, does not pass the land under the water by general words; there must be special words of grant, showing plainly the land covered with water, was intended to be granted: without such explicit words of grant, the high lands only pass. Such is the settled doctrine of this court. Martin *v.* Waddel, 16 Peters, 367. Forbes therefore could not claim as riparian owner, the land granted on his front, to Pollard: to hold otherwise would overrule the decision of Martin *v.* Waddel.

In any aspect this controversy can be presented, it falls within the decision of Pollard *v.* Kibbie: that case must be overruled, if the doctrine of the courts of Alabama is maintained.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the state of Alabama, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed, with costs.

THE UNITED STATES, PLAINTIFFS IN ERROR, *v.* WILLIAM LINN AND OTHERS.

A plaintiff may, in an action in form *ex delicto* against several defendants, enter a *nolle prosequi* against one of them. But in actions in form *ex contractu*, unless the defence be merely in the personal discharge of one of the defendants, a *nolle prosequi* cannot be entered as to one defendant without discharging the other.

Qu. Whether a plea which sets up new matter and concludes "to the country" is good.

A plea alleging merely that seals were affixed to a bond without the consent of the defendant, without also alleging that it was done with the knowledge, or by the authority or direction of the plaintiffs, is not sufficient.

A plea, which has on the face of it two intendments, ought to be construed most strongly against the party who pleads it.

A party who claims under an instrument which appears on its face to have been altered, is bound to explain the alteration; but not so, when the alteration is averred by the opposite party, and it does not appear upon the face of the instrument.

Where the plea is bad and the demurrer is to the plea, the court, having the whole record before them, will go back to the first error.

Where the date of a surety bond is subsequent to the appointment of the principal to office, the declaration should allege that the money collected by the principal remained in his hands at the time when the surety bond was executed.

THIS case came up by writ of error from the Circuit Court of the United States for the district of Illinois, and is a sequel to the case between the same parties reported in 15 Peters, 291, *et seq.* The circumstances are sufficiently set forth in the opinion of the court.

Legaré, the attorney-general, for the United States.

Coxe, for the defendants.

Mr. Justice THOMPSON delivered the opinion of the court.

This case comes up on a writ of error from the Circuit Court of the United States for the district of Illinois. The writ or summons issued in the cause purports to be in a plea of debt for one hundred thousand dollars. And the declaration contains three counts upon the following instrument, which upon oyer craved by the defendants is set out upon the record.

"Know all men by these presents, that we, William Linn, David B. Waterman, Lemuel Lee, James M. Duncan, John Hall, William Walters, Asahel Lee, William L. D. Ewing, Alexander P. Field, and Joseph Duncan, are held and firmly bound unto the United States of America, in the full and just sum of one hundred thousand dollars, money of the United States, to which payment, well and truly to be made, we bind ourselves jointly and severally, our joint and several heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this first day of August, in the year one thousand eight hundred and thirty-six." They also crave oyer of the condition of the said supposed writing obligatory, and it is read to them in these words: "The condition of the foregoing obligation is such, that whereas the President of the United States hath, pursuant to law, appointed the said William Linn receiver of public moneys for the district, of lands subject to sale at Vandalia, in the state of Illinois, for the term of four years, from the 12th day of January, 1835, by commission bearing 12th February, 1835. Now, therefore, if the said William Linn shall faithfully execute and discharge the duties of his office, then the above obligation to be void and of none effect, otherwise it shall abide and remain in full force and virtue.

Sealed and delivered in the presence of Presley G. Pollock, as to Wm. Linn, D. B. Waterman, Lemuel Lee, J. M. Duncan, John Hall, Wm. Walters, Asahel Lee, Wm. L. D. Ewing, and A. P. Field; A. Caldwell as to Joseph Duncan.

William Linn,	[L. S.]	D. B. Waterman,	[L. S.]
Lemuel Lee,	[L. S.]	J. M. Duncan,	[L. S.]
John Hall,	[L. S.]	Wm. Walters,	[L. S.]
Asahel Lee,	[L. S.]	Wm. L. D. Ewing,	[L. S.]
A. P. Field,	[L. S.]	Joseph Duncan,	[L. S.]

General Land Office.

Approved, August 30, 1836. ETHAN A. BROWN."

To the first count, which purports to be debt on the bond, the defendants plead jointly *non est factum* and several other pleas not necessary here to be noticed.

To the second and third counts which are upon the same instrument, not described however as a bond, but as a certain

instrument in writing. To these counts the defendant, Joseph Duncan, put in the following plea:

"And the said Joseph Duncan impleaded as aforesaid, by Logan and Brown, his attorneys, comes and defends the wrong and injury, when, &c. And as to the said second and third counts in the said plaintiffs' declaration contained, says that the said plaintiffs their said action on the said second and third counts ought not to have or maintain against him, this defendant; because, he says, that protesting that he executed the supposed written instrument declared upon in the said second and third counts of the plaintiffs' amended declaration, he says that after he had signed said instrument, and delivered it to his co-defendant, Linn, to be transmitted to the plaintiffs; and after the securities to the said written instrument had been affixed (approved) by the Hon. Nathaniel Pope, Judge of the District Court of the United States for the state of Illinois, it was, without the consent, direction, or authority of said Joseph Duncan, materially altered in this—that scrawls, by way of seals, were affixed to the signature of said Joseph Duncan to said written instrument, and to the signatures of the other parties to said written instrument, whereby the character and effect of the said written instrument, declared in the second and third counts aforesaid, was materially changed, and said instrument declared on, vitiated.

"And so said Duncan says, that the said supposed written instrument declared on in the second and third counts of plaintiffs' amended declaration, is not his act and instrument,—and of this he puts himself upon the country."

To which plea there is interposed a special demurrer, and the court gave judgment for the defendant Joseph Duncan upon the demurrer, thereby adjudging that the plea was sufficient in law to bar the plaintiffs from maintaining their action against him And issues being joined upon the pleas to the first count, the cause came on to be tried by a jury, and under the instructions of the court a verdict was found for the defendants upon the issues of fact. Exceptions were taken to the instructions of the court to the jury. And the correctness of such instructions is the first question presented on this writ of error.

Upon the trial, after reading the bond to the jury, the defendants called a witness, who testified in substance, that he saw the

bond after it had been signed by the obligors, in the hands of William Linn, the obligor first named therein, after it had been returned from the district judge with his certificate endorsed of the sufficiency of the sureties. That the district judge, in a note in writing, accompanying the bond, had pointed out the omission of seals to the names of the signers of the instrument; and said Linn, saying he would obviate that difficulty, took a pen, and in the presence of the witness, added scrawls, by way of seals, to each name subscribed, as makers of the instrument. Other testimony was given, under the issues of fact, which it is not material to notice.

Upon this evidence the court gave the following instruction to the jury: "If they shall find from the evidence, that after the instrument upon which the action is brought, was signed by the defendants, it was altered by William Linn, one of the defendants, without the knowledge or assent of the other defendants, by adding to the names of the defendants the scrawl seals which now appear upon the face of the instrument, and such defendants have not at any time since the alteration sanctioned it, the instrument is not the deed of such defendants, and the jury will find a verdict in their favour." And the question is, whether this instruction was in point of law correct, under the pleadings and evidence in the cause. All the defendants united in a joint plea of *non est factum*, and the proof was that the scrawls were added by Linn to his own name and to the names of the other defendants. The adding the scrawl by Linn to his own name did not vitiate the instrument as to him: he had a right to add the seal, or at least, he can have no right to set up his own act in this respect to avoid his own deed. It was therefore his deed, and the plea of *non est factum* as to him is false. And the question is, whether it is not false as to all who joined him in the plea of *non est factum*. It is laid down by Chitty in his Treatise on Pleading, that a plea which is bad in part is bad *in toto*. If therefore two defendants join in a plea, which is sufficient for one but not for the other, the plea is bad as to both. For the court cannot sever it, and say that one is guilty, and that the other is not, when they put themselves on the same terms. Chitty, 598. A plaintiff may in an action in form *ex delicto* against several defendants, enter a *nolle prosequi* as to one of them. But in

actions in form *ex contractu*, unless the defence be merely in the personal discharge of one of the defendants, a *nolle prosequi* cannot be entered, as to one defendant, without discharging the other, for the cause of action is entire and indivisible. Chitty, 599. The rule laid down by Chitty is fully sustained by the English and American decisions. In Smith *v.* Bouchin et al., 2 Strange, 993, the action was trespass and false imprisonment; plea not guilty by all, and a justification as to eight days' imprisonment. And the court held, that although the officer and jailer might have been excused, if they had pleaded severally, but having joined in the plea with others who could not justify, they had forfeited their justification. In Moors *v.* Parker and others, 3 Massachusetts, 310, the action was trespass *de bonis asportatis* against several, and all join in the plea of not guilty, and also in a plea of justification. The court held that the bar set up was no justification for one of the defendants, and if several defendants join in pleading in bar, if the plea is bad as to one defendant it is bad as to all.

So in the case of Schermerhorne and others *v.* Tripp, 2 Caines, 108, which was in error from a Court of Common Pleas. The action was trespass against a justice of the peace, the constable, and the plaintiff, and all joined in a plea of not guilty. The court said, the constable having joined with the others in the plea of the general issue, they are all equally trespassers. If he had pleaded separately, he would probably have been excused; but he has now involved himself with others, and we cannot separate their fates.

It is unnecessary to multiply authorities on this point, the books are full of them, and it is a well settled and established rule in pleading. The reason is, because the plea, being entire, cannot be good in part and bad in part, an entire plea not being divisible, and consequently, if the matter jointly pleaded be insufficient as to one of the parties, it is so *in toto*. 1 Saunders, 28, n. 2, and cases there cited.

It has been suggested that this objection is waived by the following entry in the bill of exceptions: "A judgment having been obtained against Linn for the full amount of his defalcation, a judgment on this bond was not asked against him or any of the defendants, unless the jury shall find against all the defendants."

It is not perceived how this can be considered a waiver of any error. No judgment could have been given against Linn separately, the plea of *non est factum* being joint. But the plaintiffs, according to the express terms of this memorandum, did ask a verdict and judgment against all the defendants; and if from the pleadings and evidence they were entitled to judgment against all, as we think they were, there was no waiver that will justify the instructions given to the jury.

The next question arises upon the special demurrer to the plea of Joseph Duncan to the second and third counts of the declaration. This plea sets up new matter, to avoid the instrument upon which the action is founded, and concludes to the country. And it may well be questioned, whether upon the best and soundest rules of pleading it ought not to have concluded with a verification. Chitty, in his Treatise on Pleading, (1 Chitty, 590,) says it is an established rule in pleading, that whenever new matter is introduced on either side, the pleading must conclude with a verification, in order that the other party may have an opportunity of answering it. And this rule has the sanction of many adjudged cases. In the case of Service *v.* Heermance, 1 Johns. 92, the court say there is no rule in pleading, better or more universally established, than, that whenever new matter is introduced the pleading must conclude with an averment. And the reason, say the court, is obvious, because the plaintiff might otherwise be precluded from setting forth matter which would maintain his action, although the matter pleaded by the defendant might be true. And in Henderson *v.* Whitby and others, 2 Durn. and East, 576, Buller, Justice, in giving the judgment of the court, said: By the rules of pleading, whenever new matter is introduced, the other party must have an opportunity of answering it. So that the replication setting up new matter concluded properly with an averment. Numerous authorities, both in England and in the United States, might be cited in support of this rule. But there is certainly no little confusion and diversity of opinion appearing in the books with respect to the question, when the pleadings ought to conclude to the country, and when with a verification. Many of these discrepancies may grow out of rules, said, by Mr. Chitty, to have been recently established in the English courts relating to pleadings, which have not fallen under our

notice. We will, however, pass by the demurrer for that cause in the present case, and proceed to an examination of the special matter set up in the plea in bar of the action. If this mode of pleading be adopted, the special matter set up must, as in a special plea, be such, that if true in point of fact, it will bar the action and defeat the plaintiff's right to recover. The matter set up in this plea, when stripped of some circumlocution, is, that after he, Joseph Duncan, and the other parties to the instruments, had signed the same, it was, without his consent, direction, or authority, altered by affixing seals to their signatures. The plea does not indicate in any manner by whom the alteration was made. It does not allege that it was done with the knowledge or by the authority or direction of the plaintiffs; nor does it even deny that it was done with the knowledge of the defendant, Joseph Duncan. The plea does not contain any allegation inconsistent with the conclusion, that it was altered by a stranger, without the knowledge or consent of the plaintiffs, and if so, it would not have affected the validity of the instrument. It is said that the demurrer admits the truth of the matter set up in the plea. The demurrer admits whatever is well pleaded. But it does not admit any more, and certainly does not admit what is not pleaded at all. The demurrer then admits nothing more than that the seals were affixed after the instrument had been signed by the parties and delivered to Linn to be transmitted to the plaintiffs, and that this was done, without the consent, direction, or authority of him, the said Joseph Duncan. Is this enough to avoid the instrument and bar the recovery? It certainly is not; for the seals might have been affixed by a stranger without the knowledge or authority of the plaintiffs, and would not have affected the validity of the instrument. The plea not alleging by whom the seals were affixed, it is open to two intendments. Either that this was made by the plaintiffs, which would make the instrument void, or that it was done by a stranger, which would not invalidate it. And what is the rule of construction of such a plea? It is, that it is to be construed most strongly against the defendant. This is the rule laid down by Chitty, 1 Chitty, 578, and in which he is supported by numerous authorities. And the reason assigned for this rule of construction, is, that it is a natural presumption, that the party pleading will

state his case as favourably as he can for himself. And if he do not state it with all its legal circumstances, the case is not in fact favourable to him; and the rule of construction in such case is, that if a plea has on the face of it two intendments, it shall be taken most strongly against the defendant; that is, says he, the most unfavourable meaning shall be put upon the plea; a rule which obtains also in other pleadings; and a number of cases are put, illustrating this rule. The present plea falls directly within it. The plea not alleging by whom the seals were affixed, it is left open to intendment, that it was done either by the plaintiffs or by a stranger. In the first case, it would make the deed void; in the last, it would not vitiate it. And under the rule that has been stated, the most unfavourable meaning must be put upon the plea; that is, that which will operate most against the party pleading it. And the alteration must be presumed to have been made so as not to vitiate the instrument, if the plea will admit of such construction. Suppose the plea had concluded with a verification, and the plaintiffs had replied that the affixing the seal was done without their knowledge, consent, or authority, and this state of the case had been sustained by the proof, it would not have avoided the instrument.

But, it is said, the law imposes upon the party who claims under the instrument the burden of explaining the alteration. This is the rule, undoubtedly, where the alteration appears on the face of the instrument, as an erasure, interlineation, and the like. In such case, the party having the possession of the instrument and claiming under it, ought to be called upon to explain it. It is presumed to have been done while in his possession. But, where no such *prima facie* evidence exists, there can be no good reason why this should devolve upon a party, simply because he claims under the instrument. The plea avers the alteration, and the defendant, therefore, holds the affirmative; and the general rule is, that he who holds the affirmative must prove it. And this, under the present plea, can impose no hardship on the defendant, for his affirming the fact of alteration affords a reasonable presumption that he knew by whom the alteration was made. And, in addition to this, it is a circumstance deserving considerable weight, that the defendant in his plea does not deny his having such knowledge. He avers that the seal was affixed without

his consent, direction, or authority; but he does not say it was done without his knowledge. And it is not an unreasonable inference that if he had, in his plea, disclosed by whom it was done, it would appear to have been done in a way that did not affect the validity of the instrument. There is not upon the face of this instrument any thing indicating an alteration, or casting a suspicion upon its validity, that should put the plaintiffs upon inquiry. The instrument upon its face admits it was sealed with the seals of the defendants, and purports to have been sealed and delivered, in the common conclusion of a sealed bond. So that, when the instrument came into the possession of the plaintiffs, there was nothing on the face of it to raise a suspicion against its validity. The case of Henman *v.* Dickinson, 5 Bingham, 183, has been relied upon to show that the *onus* of accounting for the alteration is thrown upon the plaintiffs. All that this case decides is, that the party who sues on an instrument which on the face of it appears to have been altered, it is for him to show that the alteration has not been improperly made. The circumstance of the alteration appearing on the face of the instrument is emphatically relied upon by the court to show that the party claiming under the instrument must account for the alteration. This was a question of evidence upon the trial, and did not arise upon the pleadings, and the report of the case does not furnish us with the pleadings. Many other cases might be cited to the same effect.

In the case of Taylor *v.* Mosely, 6 Car. and Payne, 273, the bill upon which the suit was brought appeared on its face to have been altered, and there was no evidence on either side when or by whom the alteration was made; and the question was submitted to the jury by Lord Lyndhurst, with the remark, that it lay on the plaintiff to account for the suspicious form and obvious alteration of the note, and they must judge from the inspection of the instrument, and if they thought the alteration was made after the completion of the bill, the verdict must be for the defendant. In the case now before the court, the inspection of the instrument furnishes no ground of suspicion, and from the facts stated in the plea, there must have been a considerable distance of time after the instrument was signed by Duncan before it came into the possession of the plaintiffs. The plea alleges that it was delivered to Linn, one of the defendants, to be transmitted to the

plaintiffs. But the plea does not allege that the alteration was made after the instrument came into the possession of the plaintiffs; and under this state of facts alleged in the plea, the *onus* of proving when and by whom altered, is more properly cast upon the defendant. We are accordingly of opinion that the plea is bad. But it is a settled rule that, when the demurrer is to the plea, the court having the whole record before them will go back to the first error: and when the demurrer is by the plaintiff, his own pleadings must be scrutinized, and the court will notice all exceptions to the declaration that might have been taken on general demurrer. We are accordingly thrown back on the record to examine the sufficiency of the declaration in the second and third counts.

The second count sets out the instrument as of the date of the 1st of April, 1836. That Linn's commission bears date the 12th of February, 1835, and that he was appointed receiver for four years from the 12th of January, 1835. And the count then alleges that after the making and delivering the said instrument in writing, and after the appointment of the said Linn, he entered upon the duties of his office; and that within four years from the said 12th day of January, and while he was receiver of public moneys, there came into his hands, as receiver, the sum of four millions of dollars, which it was his duty to pay over to the plaintiffs when requested, yet the said William Linn hath not, nor would he, although often requested so to do, to wit on the 2d day of April, in the year 1838, account for and pay over to the said plaintiffs the said sums of money or any part thereof, but hath wholly neglected and refused so to do. It is said this count is bad, because from the time stated in the count he might have received the money after the 12th day of January, 1835, the commencement of his office, and before the 1st day of April, 1836, when the instrument signed by the sureties bears date, and that the sureties cannot be responsible for any moneys received before they became sureties. The count alleges a demand of the money and a refusal to pay it on the 2d day of April in the year 1838, long after the defendant became surety. In the case of Farrar and Brown *v.* The United States, 5 Peters, 373, (which was an action upon a bond given for the faithful discharge of the duties of a surveyor of the public lands,) the breach assigned was,

that at the time of the execution of the bond, "there were in the hands of the surveyor large sums of money to be disbursed for the use of the United States, which he had neglected to do." And one of the questions which arose was, whether the sureties could be made liable for any moneys paid to the surveyor prior to the execution of the bond; and the court said there is but one ground on which the sureties can be made answerable, and that was on the assumption that the money was still remaining in his hands when the bond was given. And in the case of The United States *v.* Boyd, 15 Peters, 208, the court said it matters not at what time the moneys had been received, if after the appointment of the officer they were held by him in trust for the United States, and so continued to be held at and after the date of the bond. In these cases there was a direct allegation that the money was in the hands of the officer at the date of the bond. In the case now before the court, there is no such direct allegation, and this count is therefore bad on this ground. The third count is also bad for the same reason.

The judgment of the Circuit Court must accordingly be reversed, and the cause sent back for further proceedings.

Mr. Justice McLEAN dissented.

The joint plea of *non est factum* to the first count in the declaration being bad against Linn, is undoubtedly bad against the other defendants. But this point was not raised in the Circuit Court. It was not intended to be raised. On the contrary, the counsel agreed to submit the question under the plea, whether the annexation of the seals by Linn vitiated the bond as against the sureties. And the reason for this was stated in the following entry on the record: "A judgment having been obtained against Linn for the full amount of his defalcation, a judgment on this bond was not asked against him or any of the defendants, unless the jury shall find against all the defendants."

This agreement was treated by the counsel on both sides, in the Circuit Court, as waiving any technical question arising on the pleading. No one could doubt that the bond was good against Linn. And it is equally clear that, technically, the plea was bad for the other defendants, it being bad as to Linn. And it was to avoid any technicality of this kind that the agreement

was entered into. It is less definite than it should have been, but still its object seems to be manifest. That a construction here would be given to the agreement different from that which was given to it by the United States attorney in the Circuit Court, was not expected. His construction is shown from the fact of his not having suggested any objection to the court below arising on the joint plea.

The plea of Joseph Duncan as to the alteration of the bond is held to be bad, because it is not averred that it was altered by the plaintiffs or by their authority. At the same time it is admitted that, on the general issue, the person claiming under the deed must explain any interlineation or alteration upon its face, so as to show the bond is not vitiated. The reason of this is clear. The party having possession of the bond is presumed to have a knowledge of any alteration of it, and is therefore required to explain it. *Prima facie,* any material alteration vitiates the bond.

Now the special plea in this case states a material alteration, by affixing the seals, after the instrument had been approved of by the district judge. The demurrer admits the facts stated in the plea. Does it not follow, then, that the plea is good, if the alteration alleged in it be a material one; such an one as vitiates the instrument unless explained? No rule in pleading is better settled than that a fact which is presumed to be known to the plaintiff, and is not presumed to be within the knowledge of the defendant, the defendant need not aver it in his plea, if he can without the averment set up a *prima facie* defence. Mr. Chitty says, 1 vol. of Plead. 255, "It is also a general rule, that matter which should come more properly from the other side need not be stated. In other words, it is enough for each party to make out his own case or defence. He sufficiently substantiates the charge or answer for the purposes of pleading, if his pleading establish a *prima facie* charge or answer. He is not bound to anticipate, and therefore is not compelled to notice and remove in his declaration or plea every possible exception, answer, or objection which may exist, and with which the adversary may intend to oppose him." Com. Dig. Pleader, c. 81; Plowd. 376; 2 Saund. 62 a, n. 4; 1 Term Rep. 638; 8 Term Rep. 167; Stephen's Pl. 1st ed. 354.

No one can doubt that the alteration averred in the above plea, appearing on the face of the instrument, would vitiate it, unless explained by the holder. And it follows then that the plea stating the fact, which the demurrer admits, must be answered and explained.

The defendant must know whether an instrument which he has executed has been altered in a material part. But he is not presumed to know by whom it has been altered, while it is in the possession of the party who claims under it. If the defendant must aver this, he must prove it; and this would be impossible. But, on the other hand, the person claiming under the instrument, and who has always been in possession of it, may well be presumed to know by whom it has been altered, and, therefore, he, and he only, can explain it. Any other rule would be most unreasonable and contrary to any proper system of pleading.

The rules lately adopted by the courts of England in regard to pleading seem "not to have fallen under the notice of this court." This is to be regretted, as those rules have been published in the late editions of Mr. Chitty on Pleading, and are known to the profession throughout the country.

It is true, as the court say, that intendments are taken against the plea; but intendments must not only be practicable, but reasonable. If a fact in the plea be omitted, which the defendant cannot be presumed to know, and which must be known to the plaintiff, no intendment against the plea can be drawn.

Mr. Stephens, in his Treatise on Pleading, 350, under the head that, "it is not necessary to state matter which would come more properly from the other side," says, "this, which is the ordinary form of the rule, does not fully express its meaning. The meaning is, that it is not necessary to anticipate the answer of the adversary; which, according to Hale, C. J., 'is like leaping before one comes to the stile.' It is sufficient that each pleading should in itself contain a good *prima facie* case, without reference to possible objections not yet urged." "Thus in pleading a devise of land by force of the statute of wills, 32 Hen. 8, c. 1, it is sufficient to allege that such an one was seised of the land in fee, and devised it by his last will, in writing, without alleging that such devisor was of full age. For though the statute provides that wills made by *femes covert*, or persons within age, &c., shall not

be taken to be effectual; yet if the devisor were within age, it is for the other party to show this in his answer, and it need not be denied by anticipation."

"So where an action of debt was brought upon the statute 21 Hen. 6, against the bailiff of a town for not returning a burgess of that town for the last Parliament, (the words of the statute being that the sheriff shall send his precept to the mayor, and if there be no mayor, then to the bailiff,) the plaintiff declared that the sheriff had made his precept unto the bailiff, without averring that there was no mayor. And after verdict for the plaintiff, this was moved in arrest of judgment. But the court was of opinion clearly, that the declaration was good; for we shall not intend that there was a mayor, except it be showed; if there were one, it should come more properly on the other side."

"Where the matter is such that its affirmation or denial is essential to the apparent or *prima facie* right of the party pleading, there it ought to be affirmed or denied." Now the alteration of the instrument in a material part, after Duncan the defendant had signed it, without his consent or knowledge, did make a *prima facie* case. It made such a case, as, upon the general issue, would have required the plaintiffs to show by whom it was altered. And this shows that the plea is good. It is the same principle whether it arise on the general issue or by special plea. The same order of proof is required. The plaintiffs, therefore, instead of demurring, should have pleaded over, and alleged that the alteration was made by a stranger, and, consequently, that it did not vitiate the instrument.

The plea should have concluded with a verification, and not to the country. But this could only be taken advantage of by special demurrer. This defect is not one of the causes assigned in the demurrer, and, therefore, cannot be objected to.

The second and third counts of the declaration being bad, as ruled by the court, the judgment of the Circuit Court should, on those counts, have been affirmed, and not reversed. Mr. Stephens, in his Pleading, 144, says again, "It is a rule, that on demurrer the court will consider the whole record, and give judgment for the party who, on the whole, appears to be entitled to it." "Thus on demurrer to the replication, if the court think the replication bad, but perceive a substantial fault in the plea, they

will give judgment, not for the defendant, but for the plaintiff, provided the declaration be good; but if the declaration also be bad in substance, then, upon the same principle, judgment would be given for the defendant." Piggot's case, 5 Rep. 29 a; Bates v. Cost, 2 Barn. & Cres. 474.

I believe this case is the first exception to the above rule. Notwithstanding the above defective counts, judgment is given generally against the defendant. It is hoped that this ruling will not establish a precedent in other cases.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the district of Illinois, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said Circuit Court, with directions to proceed therein conformably to to the opinion of this court.

THOMAS MORRIS, COMPLAINANT AND APPELLANT, *v.* MARIA NIXON, HENRY J. WILLIAMS AND THOMAS BIDDLE, HENRY J. WILLIAMS AND MARIA NIXON, EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY NIXON, DECEASED, AND MARIA NIXON, SOLE DEVISEE OF THE SAID LAST WILL AND TESTAMENT OF HENRY NIXON, AND MARY HUSBAND, AMELIA M. MORRIS, ROBERT MORRIS, WILLIAM P. MORRIS, CHARLOTTE E. MORRIS, HENRY MORRIS, SARAH MORRIS, CHILDREN AND HEIRS AT LAW OF HENRY MORRIS, DECEASED, AND CORNELIUS STEVENSON AND SAMUEL C. CLEMENTS, ADMINISTRATORS OF SAID HENRY MORRIS, DECEASED.

A deed, absolute on the face of it, declared to be a security for money loaned.

Where a bill substantially charges that there is a fraudulent attempt to hold property under a deed, absolute on the face of it, but intended as a security for money loaned, evidence will be admitted to ascertain the truth of the transaction.

Where there is proof of parties meeting upon the footing of borrowing and

lending, with an offer to secure the lender by a mortgage upon particular property, if a deed of the property, absolute on the face of it, be given to the lender, and the lender also take a bond from the borrower, equity will interpret the deed to be a security for money loaned, unless the lender shall show, by proofs, that the borrower and himself subsequently bargained upon another footing than a loan.

Where a loan is an inducement for the execution of a deed which is absolute on the face of it, though the loan is not recited as the consideration of the deed, or as any part of it, if the lender or grantee in the deed treats it substantially as the consideration, or a part of it, equity will declare the deed to be a security for money loaned.

The answer of one defendant in equity is not evidence in behalf of another defendant.

If, in equity, it is admitted or proved that one of the documents in a transaction was not intended to be what it purports, it subjects other documents in the same transaction to suspicion.

THIS was an appeal from the equity side of the Circuit Court of the United States in and for the eastern district of Pennsylvania, and arose upon the following facts.

On the 2d of January, 1812, Jonathan Williams and Thomas Morris (the complainant) purchased from the Bank of North America a parcel of land upon the Schuylkill river, near the city of Philadelphia, for the sum of $80,000; $20,000 of which was to be cash, and the remaining $60,000 was divided into three payments of $20,000 each, which were to become due on the 25th of March, 1814, 1815, and 1816, respectively. The parties gave their joint and several bonds for these sums, with a warrant of attorney to confess judgment, and a mortgage upon the property. It afterwards appeared that Morris was not exclusively the owner of his moiety.

On the 27th June, 1812, Morris gave a power of attorney to Thomas Biddle and Henry Nixon, to manage the property for him.

In 1815, Williams died intestate, leaving Henry J. Williams and Christine, the wife of Thomas Biddle, his heirs at law.

In April, 1816, Morris and the representatives of Williams executed a power of attorney to Biddle and Nixon, authorizing them to enter into and take possession of the property, sell or lease it, receive the money, execute deeds, &c.

Under this power, they accordingly took possession, and exercised all manner of ownership over it.

A great number of letters between the parties were given in

evidence, running from this time to the year 1822, relating to the condition and prospects of the property. One of the bonds had been paid out of the proceeds of sales, and considerable payments made on account of another. The third was wholly unsatisfied.

In 1822, Morris, residing in New York, applied to Nixon for a loan, under the circumstances stated so particularly in the opinion of the court that it is unnecessary to mention them here. Nixon declined making a loan, but took from Morris a deed, absolute upon the face of it, conveying the whole of Morris's interest to Nixon, and reciting that Nixon had always been interested in the purchase to the extent of three-sixteenths of the whole, or three-eighths of Morris's moiety. Nixon then loaned to Morris $5000, for which he took his bond.

The deed also recited that there had been allowed to Nixon for his agency, the sum of $2000; one-half of which, or $1000, had been paid by the representatives of Williams, but paid to Morris; and five-eighths of the other $1000, (or $625,) were justly chargeable to Morris; thus bringing Morris in debt to him $1625, which was released in the deed. It also contained other recitals, which are mentioned in the opinion of the court.

In 1836, Morris filed a bill on the equity side of the Circuit Court of the United States for the eastern district of Pennsylvania, against Nixon and other parties, alleging that the deed was only a security for the money loaned; that, at the time of its execution, there was not, between himself and Nixon, any contract, agreement, understanding, or negotiation for a sale; that Nixon had furnished no account of his agency; and praying for an account and general relief. The parties all answered; and in April, 1841, the Circuit Court, after a hearing, dismissed the bill with costs. The complainant appealed to this court.

Wood, for the appellant.

Sergeant and *Williams*, for the appellees.

Wood made the following points:

I. The deed of the 28th May, 1822, explained by the letter of the defendant, Nixon, to the plaintiff, would constitute *per se* a mortgage of the premises to secure the loan for $5000.

II. The said deed was designed by the parties thereto to secure the said loan, and was designed in substance to be a mortgage,

assuming the shape of an absolute conveyance, only as a more effectual security for the loan.

III. If said Nixon designed otherwise, yet the complainant was led by his conduct, and by all the circumstances, to consider it a security for the loan, and it ought to be treated as such.

IV. A deed, though absolute on its face, may be shown, by parol evidence, to be designed as a security for a loan, or a mortgage, and more especially by written evidence furnished about the time the deed was given, and conducing to show the same.

V. If it should appear that said deed was designed by the parties to be an absolute conveyance in fee, it ought to be set aside, or modified and converted into a mere security for said loan. Because:

1. The consideration therein was grossly inadequate.

2. There was no negotiation for a sale between the parties thereto, either personally or through authorized agents, and no estimate of value.

3. The plaintiff, the grantor therein, was not in a condition to deal at arm's length—being much embarrassed, in want of money, and ignorant of the condition of the property—the grantee being a capitalist, having the property under his management, and fully acquainted with its condition and value.

4. The grantee did not fulfil his duty as steward and agent in apprizing the grantor, at the time of said conveyance, of the condition and value of said property.

5. Undue influence was exercised by the grantee upon the grantor, in pressing upon him a sale to himself in the condition in which said grantor was placed, and in the relative condition in which they stood at the time to the property and to each other, as lender and borrower, steward and principal.

VI. Lapse of time is no bar to the complainant's equity under the last-mentioned point. Because:

1. Such a bar is not set up and relied upon in pleading.

2. The influence and control of the said grantee in said deed, over the grantor, and the grantor's ignorance of the condition of the property, continued until a short time before exhibiting the bill of complaint.

3. The relationship in which the parties stood to each other,

as steward and principal, lender and borrower, will prevent the bar from applying in equity to the relief sought for by the bill.

VII. Lapse of time is not a bar to the complainant's equity, for a full account and relief in regard to the matters arising, as well before as subsequently to the said deed. All which he is fully entitled to.

VIII. The agreement, for a conveyance from the complainant to Maria Nixon, should be modified so as to embrace only one-eighth of the plaintiff's moiety of the premises, and she should be decreed to be entitled only to the net proceeds of said one-eighth part.

Mr. Justice WAYNE delivered the opinion of the court.

The complainant, besides other relief prayed for, asks the aid of this court to decree a deed made by him to Henry Nixon, and which is absolute on the face of it, to be a security for money advanced upon loan, and that he may be at liberty to redeem the premises conveyed, by paying to Nixon, or by allowing to him, on account of the transactions between them, the moneys loaned to him by Nixon and such as he may have advanced on account of the real estate purchased by the complainant and the late General Jonathan Williams from the Bank of North America; for the resale and improvement of which, the defendants, Henry Nixon and Thomas Biddle, were the attorneys and agents of the purchasers.

The surviving family, however, of General Williams, are in no way interested in this suit. The controversy is between Thomas Morris and the representatives of Henry Nixon, whose death has occurred since the bill was filed.

The deed from complainant to Henry Nixon bears date the 28th May, 1822.

It recites the purchase made by Williams and Morris; that certain portions of it had been sold and conveyed to other persons, and that parts had been let on ground-rents, so that the quantity remaining was about seventy acres. That the sales and income of the property had nearly reimbursed the purchasers the first payment which they had made, of $20,000; that there had been paid upon the purchase, out of the income and proceeds of sale, from time to time, enough to reduce the sum due by the

purchasers, to about $29,000, which was a charge upon the premises, to be borne by the owners thereof, in proportion to their respective interests. It then recites, that at the time of the execution of the indenture to Williams and Morris, Henry Nixon was, and had continued to be interested with Morris, to the extent of three-eighth parts of the moiety, so as to entitle him to the benefits and subject him to the obligations of the purchase in that proportion. The consideration of the deed is then recited to be, one-half part, "or thereabouts," of a debt due by the complainant to Thomas Biddle and John Wharton, which was originally $4000, for the security of which, the complainant had, with the assent of Henry Nixon, mortgaged a part of the moiety of the original purchase; then a debt claimed by Nixon to be due to him by the complainant of $1625; $1000 of which it is said the complainant received on account of Nixon's agency for the moiety of the purchase belonging to Williams, and $625 being the proportion justly chargeable to complainant for Nixon's agency for the other moiety. There was a further consideration amounting to $4600; being the amount of two notes which had been discounted, at the Bank of North America, for the accommodation of the complainant, with Nixon's endorsement.

The circumstances attending the execution of the deed are disclosed in the pleadings and by other proofs in the cause.

The complainant resided in New York, and Nixon lived in Philadelphia. The former, being in great pecuniary distress, and fearing greater within a few days, unless he could make a loan, sent his brother, Henry Morris, to Philadelphia, to obtain from their brother-in-law, Henry Nixon, an advance of $5000, offering, as security, his interest in the property bought by himself and General Williams. Nixon says, in his answer, that his feelings being wrought upon by the representation, made by Henry Morris, of the urgent nature of his brother's wants, and the destructive consequences to be apprehended if he could not meet a demand there was upon him, he concluded to provide the money; that, however, before he finally agreed to do so, he told Henry Morris that he must consult his counsel upon the subject.

After consulting counsel, he informed Henry Morris, that he had determined to deal with the complainant upon no other terms than an absolute sale and conveyance of all his interest,

legal and equitable, in the premises bought by him and Williams; and as there would be a full consideration without it, that the loan would create a new debt, for which he would take a separate evidence or security; that he was advised by his counsel to write out in the deed at large the real consideration, so that the truth of the transaction might at all times appear upon the papers, and to take a bond for the loan, so that if the purchase should turn out well, he would not be bound to enforce the bond, but, in case of misfortune to the complainant, he would have evidence of his right as a creditor, and, if he should think fit, might use it for the benefit of the complainant or his family. In connexion, however, with the foregoing statement, Nixon declares that in the course of his conversation with his counsel, he was asked, whether the interest of the complainant in the property was worth the encumbrances upon it, and what was already due by him to Nixon. To which he replied, as he truly believed, that it would not bring more; that nothing but the peculiarity of the circumstances would induce him to increase his interest, or become a purchaser of it; and that he determined, as he had been advised by his counsel, to buy out the complainant's interest entirely and absolutely, without any trust, direct or indirect, express or implied; nor any understanding whatever, that the complainant or any other person was to have a claim or benefit therefrom, and that he would deal with him on no other terms.

Henry Morris arrived in Philadelphia on the 23d of May. His first conversation with Nixon concerning his errand was on that day; on the 24th, Nixon consulted counsel, informed Henry Morris of the result, and on the same day, the same counsel made a draft of the deed. On the same day, too, Nixon wrote to the complainant the following letter:

Dear Morris,—Henry arrived here early yesterday morning. Having had a conversation with him on the subject of a loan, I have only to say my best exertions will be to obtain this object, and to enable me to do which, Henry will immediately call on you to advise the only mode that he or I can suggest to achieve it.

You, I am sure, will have confidence in me as to the mode proposed, which Henry will communicate; and be assured my sincere prayers will be, and best exertions to promote this all-important point. In haste, truly yours, H. Nixon.

This letter was written after Nixon had consulted counsel; for he says in his answer, after he had done so, he thereupon returned to Henry Morris, and informed him of the determination he had come to, of dealing upon no other terms than an absolute conveyance, without any trust, and taking a bond for the loan. And in the letter it is stated, that "Henry will immediately call on you to advise you of the only mode that he or I can suggest to achieve it."

The draft of the deed being made on the 24th May, it was afterwards engrossed by the witness Cash, and he was sent with it to New York. He arrived there on the 28th, the deed was signed by Morris and his wife, Cash and Henry Morris being witnesses. On the same day, Cash left New York on his return to Philadelphia. On the following morning, the 29th May, as it appears by a letter of that date from Nixon to the complainant, Henry Morris arrived again in Philadelphia. He says in his answer, that he found Nixon resolved to do nothing in the business unless the conveyance was absolute and *bona fide*, and he was therefore obliged to deliver the deed without any promises of trust. And Nixon declares that Henry Morris delivered to him the deed, and at the same time a bond, in the handwriting of the complainant, for $5000.

It is in proof, also, that when the deed was delivered, there were unadjusted accounts growing out of Nixon's and Biddle's agency for the property. That no account had been furnished to the complainant since 1816, except an abstract of one Innes's account of the excavation and sales of stone and gravel, sent to him by the defendant, Henry J. Williams, in May, 1819.

The recital in the deed shows that the accounts were unascertained, for it speaks of the $20,000 which was first paid by Williams and Morris on their purchase as being nearly reimbursed, and that there remained due on the purchase about $29,000.

Two years before the deed was executed, the complainant made an agreement with David Walker and Henry Morris, to convey to them in trust for his sister, Maria Nixon, a fourth part of her moiety, upon the terms stated in the agreement, in pursuance of his original intention when Williams and himself made the purchase.

It was urged in the argument, that the recitals in the deed relating to the sum then due upon the purchase of Morris and Williams, that of Nixon's interest in it, and the debt claimed by Nixon to be due to him on account of his agency, were incorrect. We shall not, however, consider these objections, or those which were made against the validity of the deed on account of inadequacy of price, undue influence, and surprise.

Our object is to dispose of this case for the present, by assigning to the deed its true character in equity, under all the circumstances attending its execution.

The charge against Nixon is, substantially, a fraudulent attempt to convert that into an absolute sale which was originally meant, by himself and the complainant, to be a security for a loan. It is in this view of the case that the evidence is admitted to ascertain the truth of the transaction, though the deed be absolute on its face. The transaction was begun by Morris, with the request of a loan from Nixon, for which he offered a security upon the property, for the management of which, Nixon was his agent. It ended by Morris giving to Nixon a deed for the property, absolute on its face, and also a bond for a loan of $5000. Unless, then, some proof has been given to show that they truly bargained upon another footing, and that the loan did not form the chief inducement for the execution of the deed, and had not been treated by both parties as a substantial part of the consideration, though not expressed in the recital, equity will interpret it to be a security for money loaned.

Is there any such proof in this case? None that we can see, even if the defendants are allowed to use as evidence, as they contend they have a right to do, the answer of their co-defendant, Henry Morris. His account of the transaction is, that in an interview with Nixon succeeding that when he made the application for a loan, and when Nixon declined lending, stating that his own embarrassments required all the funds he could command; that Nixon said, it was very doubtful if the "Hills property" would more than pay the claims upon it, and he could not consent to make the loan, unless Morris would convey the property to him; and he added, if the property should eventually turn out well, he would account to Thomas Morris for it, and share it with him. And in the third interview Nixon told him that his counsel had

advised him upon no account to let the complainant have the money, unless an absolute and *bona fide* conveyance of the whole premises was made; that, upon receiving his answer, he returned to New York, and communicated the determination of Nixon to his brother; and that, upon his return to Philadelphia, he was obliged to deliver the deed without any promises of trust, as he found Nixon resolved to do nothing in the business, unless the conveyance was absolute and *bona fide*. He says, however, he was satisfied in his own mind that, if the property turned out well, Nixon would give a handsome share of it to the complainant; and that, in consequence of this impression, he always wrote to him as if he was still interested in the successful result of the purchase. We are in no way, though, influenced by the answer of Henry Morris in coming to our conclusion as to the character of the deed. It has been introduced because it was strongly urged to be good evidence in behalf of the defendants, by their counsel; and with the view of showing, even though the facts stated had been proved, that they would not take the case out of the principle,—that a deed absolute on the face of it, for property, offered to secure a loan in a case in which the parties originally met upon the footing of borrowing and lending, will be considered a deed in the nature of a mortgage, to secure a loan, though another consideration shall be in the recital of the deed than the loan, unless it shall be proved that the parties afterwards bargained for the property independently of the loan; or if it shall appear that the chief inducement of the grantor in making the deed, was to procure the loan; or that the grantee, after the execution of the conveyance, treated the money which he had advanced as a substantial part of the consideration, and not as a loan. There is no proof in this case that the parties bargained without a reference to an advance by Nixon of $5000, and it does appear that Morris was only induced to make the deed from the offer of Nixon to make the advance of that sum, and that Nixon treated it substantially as a part of the consideration to be given for the property, as he took a bond from Morris for the amount, and says it was only to be contingently enforced, for the benefit of Morris or his family, in the event of Morris falling into misfortune.

Courts of equity will not permit so uncertain a benefit as is

here expressed, to weigh at all in their consideration of cases like this; for, if they did, it might become a contrivance to give plausible colouring to an originally meditated fraud, or to one induced by the temptation of subsequent gain.

But besides the transaction itself, as it appears in the pleadings, there were relations of interest and of agency, between Thomas Morris and Henry Nixon, in respect to the property; and such as grew out of the embarrassments of the former, and also out of his particular condition to the recitals of consideration in the deed, which combine to raise a violent presumption, of a secret trust, and that the deed was meant to secure Nixon's advances, loans, and endorsements for Morris.

Nixon claimed an interest in the property, besides the one-fourth of the moiety which Morris had agreed to convey to Walker and Henry Morris, in trust for Mrs. Nixon. For the former, Nixon had not such satisfactory evidence as he could rely upon. This appears from his correspondence. Morris was much embarrassed; no one knew his pecuniary difficulties better than Nixon did. He remembered, too, that Morris, without consulting him, had offered to mortgage the property to the United States. He feared, from the disclosures made by Henry Morris of the pressing necessity of his brother, that he might mortgage the property to raise the sum he then stood in need of, to some other person if Nixon did not advance it; so that, at some other time, urged by want of money or the demands of creditors, he might be induced to convey to others an interest in the concern. That new parties might interfere with the management of it, to the injury of all who were originally interested; that the bank, by any change in the ownership, and the course which might be pursued in respect to the property, might not continue to be so indulgent as it had been, in postponing the payment of the purchase-money still due. Besides, sales of this property to individuals and purchases from the city were then anticipated! the latter a slow, but sure speculation; almost at the price of the owners, from the contiguity of public works, which could not be abandoned; nor could they be carried on without more of the property than the city had already bought. Add, the embarrassed condition of Morris; the connexion and close intimacy between the parties; their excited expectations, extended by exaggerated

representations to the females of the family, that all concerned would realize great pecuniary advantages from the property; the certain interest, also, of Mrs. Nixon in it, and the certainty, that, by keeping it under their own control, it would be managed in their own way; all these considerations were cogent inducements with Nixon to get a legal title from Morris, and the moment when Henry Morris presented himself to solicit a loan for his brother was the occasion upon which it could certainly be obtained.

But further, Morris's condition, in respect to the consideration recited in the deed, was not such as to induce him to wish to part with the property. Nor does Nixon's assumption of the particular debts of Morris, recited in it, bear the aspect of a genuine purchase. It was not a present payment of any thing; and, if genuine, was the purchase of Morris's speculation, by an advance of $5000, which, according to the face of the transaction, was to be repaid. And may we not say, when in the same transaction we have it admitted that one of the documents was not meant by the parties to be what it purports, that another of them by this fact is subjected to suspicion?

But we have said, though Morris was embarrassed, that he was not pressed by any of the particulars recited in the deed as a consideration.

The purchase-money remaining due to the bank on the property, the bank had permitted to remain unpaid, finding no doubt its advantage in the interest. Both principal and interest were ultimately paid, not by Nixon, but by sales of the property.

The debt due to Biddle and Wharton was secured by a mortgage upon a part of the property, given by Morris with Nixon's consent. The notes discounted at the bank for the accommodation of Morris with Nixon's endorsement, had been renewed, and were running as an accommodation, to be renewed again and again, as they were in fact, without any change of names to the paper, after the deed was executed. Nixon could not press for the commissions claimed as agent of the property, or did not intend to do so; for we find him writing to Morris on the 21st May, two days before Henry Morris arrived in Philadelphia on his errand for the loan, and seven before the deed was executed, to make himself easy as to commissions, as it had not been his intention to ask for them; or acknowledging he had no right to

do so, until "the final closing of the accounts, agreeably to the first agreement when the Hills were bought."

Such was the situation of Morris, in respect to the debts named in the deed as the consideration for which an absolute title was to pass. He was an embarrassed man, and hard pressed at that moment for $5000, and though destructive consequences were to assail him if he could not get it, is it likely that Nixon then could have been insensible to the ties which had united them, and could have made his distress the means of coercing from him an absolute conveyance, without a secret trust of all that he had left, upon which he could rest a hope to raise himself a little above his ruined fortune? We cannot think so. If we did, it would be our duty to give another aspect to this transaction, from which the defendants would derive no benefit.

If a doubt remained upon our minds in respect to the character which should be given to the deed, the letter from Nixon to Morris, of the 24th May, would remove it.

It may be considered, either as having been intended by the writer to put Morris at ease in respect to the conveyance and bond which were required, or as a letter calculated to mislead Morris in respect to the use which Nixon would make of the conveyance. The letter might be, either the artifice of the writer to accomplish an unjust intent, or the language of the letter and manner of using it might innocently mislead. In either event, if the letter is such as is likely to mislead, and from which it can be fairly implied, that it induced a confidence that the receiver of it would have any benefit from or interest in the property, he was required to convey contrary to the terms of the deed, it would be fatal to it as an absolute deed.

Nixon and Morris were brothers-in-law. There seems to have been between them fraternal intimacy and confidence. It appears to have been unlimited in all the relations of social life and of business. The confidence of Morris was unwavering, and dependent, from the superior business ability of Nixon. Nor can it be denied that it was met by him in Morris's difficulties by acts of timely assistance and kindness. Nixon had been his agent in the management of the property from 1812. He claimed an equitable interest in it, besides the proportion of Mrs. Nixon. There were unascertained accounts of Nixon's agency when the

deed was made. Morris had received no account since 1816, except an abstract of sales of some stone and gravel, furnished to him by one of the defendants in 1819. He did not know particularly what had been the proceeds of the sales and income of the property, or how they had been applied. No examination or estimate of the value of the residue of the property, as it then stood, was made. No communication had been given by the agent of the effect of public and private improvements upon it, in respect to its then, or prospective value. Nothing was said between Morris and Nixon as to the price that the taker was to give. In this situation, being greatly embarrassed, Morris asked a loan from his agent. The agent says, 'I am aware of your embarrassment. There are certain claims upon this property which you will have to pay, and other responsibilities of yours for which I am also answerable. I will provide the money of which you stand in need, will take a bond from you for it, which I am not to enforce against you, unless you should fall into misfortune, and then only, should I see fit to do so, for the benefit of yourself or your family, if you will give me an absolute conveyance of the property.' The conveyance is given, the bond is taken, and now it is said the transaction was intended to be an absolute sale, and not a security for a loan. We do not think that the connexion between the bond and the deed can be dismembered. Nor can we reconcile it with what we believe would have been the ordinary conduct of men in like circumstances, to suppose, that an agent so situated to a principal and friend in distress, could have intended, by asking for an absolute conveyance, to use it for any other purpose than to secure himself in the sum he was about to advance and his other responsibilities for his principal. Morris was a ruined man. Nixon knew it, and treated with him in this instance as if the crisis had come when creditors would no longer be satisfied with postponed promises. It was natural for Nixon, nor was it wrong in the then state of real property, and as he was about to advance to his brother-in-law $5000, to take the most efficient way to secure himself from loss, and to put it out of the power of Morris to interfere with his security, by subsequently giving to others an interest in the property. We find upon a preceding occasion when Morris was pressed, and had offered to mortgage this pro-

perty, that Nixon suggested that it should be put into his hands, with the trust expressed of what was intended. His object then was, that the original intention of the purchase might be carried out for the benefit of all concerned. Nixon's inducement to do so was greater than it had been at that time. Mrs. Nixon's interest of one-fourth in the moiety of the property had been in in the mean time secured to her by her brother.

We will now turn to the letter of the 24th May from Nixon to Morris, to confirm the view we have of this transaction. It begins,

"DEAR MORRIS,—Henry arrived here early yesterday morning. Having had a conversation with him on the subject of a loan, I have only to say, my best exertions will be to obtain this object, and to enable me to do which, Henry will immediately call upon you to advise you of the only mode that he or I can suggest to achieve it."

It must be remembered that the letter was written on the day that Nixon consulted his counsel, after the consultation had been had. The answer of Nixon shows this. He says, that he had concluded to provide the money, but that he must consult counsel before he finally agreed. And then that he thereupon returned to Henry Morris, and informed him of the determination he had come to of dealing upon no other terms than an absolute sale and conveyance, and taking a bond for the loan. When, then, Nixon says in the letter, "Henry will immediately call upon you to advise you of the only mode that he or I can suggest to achieve it," it is manifest that the mode had been a subject of conversation between them; and as he mentions in the letter, the loan in connexion with the mode, which Henry was to communicate to his brother, this contemporary letter must be called on to ascertain what Nixon intended by the mode; and more especially so, as it seems the contents of the letter had not been told to Henry Morris.

The mode was an absolute conveyance of the property and a bond. But there is, in connection with the mode, the declaration of an intention, coupled with an ability, in consequence of the mode, to achieve a loan. It would then be a very strained inference, from the words of the letter, to say, that Nixon did not mean that Morris, to whom he was writing, should understand

that he meant a loan, to be secured by a conveyance of the property, as well as by a bond; or that he meant, that the loan which he could achieve by the mode was to depend upon Morris making to him an absolute sale of the property for the considerations expressed in the deed. If such had been his meaning, it could have been plainly said. But we think there can be no doubt concerning what the writer of this letter meant, or the construction which, in a court of equity, should be put upon it, when we find him saying: "You, I am sure, will have confidence in me as to the mode proposed, which Henry will communicate; and be assured my sincere prayers will be and best exertions to promote this all-important point." This language indicates a sincere desire in Nixon at that time to relieve the distress of his brother-in-law. That he intended to solicit his confidence as to the mode proposed, to secure himself from loss, without depriving Morris of a participation in the prospective advantages which they had mutually indulged for ten years in respect to the property, and which, it cannot be denied, had in a great degree been excited by the representations of Nixon. In Morris's situation it was a great point gained for the benefit of all concerned in the property, that the legal control of it should be taken from him and vested in Nixon.

This letter we think a part of the entire transaction, and stamps its character in a court of equity. It could only have been intended to put Morris at ease in respect to the absolute conveyance which Nixon required; or it was designed mislead and deceive Morris, by expressions of sympathy which were not felt, and a solicitation of confidence not deserved. If the latter, we should feel bound to pronounce the transaction a meditated fraud, successfully accomplished. We adopt the first as most probable, and in that view of the case decree the conveyance of the 24th May, 1822, to be a deed, with a secret trust, for the security of moneys loaned and advanced by Nixon to the grantor. This conclusion makes it unnecessary for us to consider the effect of time upon the rights in controversy.

We order the decree of the Circuit Court to be reversed, and that the cause be remanded, with instructions to the court to have an account taken, and that the complainant be allowed his

proportion at the rate of an interest of five-eighths in a moiety of the original purchase of Morris and Williams, and that the court shall take such other proceedings in the cause as equity may require.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the eastern district of Pennsylvania, and was argued by counsel. On consideration whereof, it is now here considered, ordered, and decreed by this court, that the decree of the said Circuit Court in this cause be and the same is hereby reversed, with costs, and that this cause be and the same is hereby remanded to the said Circuit Court, with instructions to that court to have an account taken; and that the complainant be allowed his proportion at the rate of an interest of five-eighths in a moiety of the original purchase of Morris and Williams, and that the said court shall take such other proceedings in the cause as equity may require.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF THE UNITED STATES, AND THE UNITED STATES, *v.* JAMES B. BEVERLY AND JANE HIS WIFE, WILLIAM RAMSAY AND ELIZABETH HIS WIFE, HAMILTON AND JAMES PETER, HEIRS OF DAVID PETER, DECEASED, AND GEORGE PETER, SURVIVING EXECUTOR OF DAVID PETER, DECEASED.

The case in 10 Peters, 562, reviewed and confirmed.

A fact tried and decided by a court of competent jurisdiction cannot be contested again between the same parties; and there is no difference in this respect between a verdict and judgment at common law and a decree of a court of equity.

But an answer in Chancery setting up, as a defence, the dismission of a former bill filed by the same complainants, is not sufficient unless the record be exhibited.

A disposition by a testator of his personal property to purposes other than the payment of his debts, with the assent of creditors, is in itself a charge on the real estate, subjecting it to the payment of the debts of the estate, although no such charge is created by the words of the will.

Lapse of time is no defence where there is an unexecuted trust to pay debts, which this court, in 1836, decided to be unpaid in point of fact.

THIS case grew out of that of Peter *v.* Beverly, which came before this court in 1836, on an appeal from the Circuit Court of the District of Columbia, in decreeing an injunction on the proceedings of the then complainants, to sell a part of the real estate of David Peter, deceased. A full report of that case will be found in 10 Peters, 532, *et seq.*, wherein all the facts and circumstances attending it are fully set forth in the opinion of the court, and do not require repetition now. The result of that opinion was a reversal of the decree below; a dissolution of the injunction; an order that the bill of the complainants be dismissed, and that the cause be remanded to the Circuit Court, with directions to carry the decree of this court into effect. This was done, and the decree consummated by a sale of the property in controversy, which consisted of those parts of the real estate of David Peter which he had by his will charged with the payment of his debts; but they being insufficient for the purpose, the present bill was filed in order to subject the residue of the estate, not so charged directly by the will, to the payment of the residue of the debts of the estate.

In March, 1836, the heirs or devisees of David Peter executed a deed to John Marbury, authorizing him to sell certain property, which he accordingly did; the amount of sales being $38,722 32 cents.

At a subsequent period of 1836, the Bank of the United States, in behalf of the said bank, and of the United States, and of such of the creditors of the estate of David Peter as should come into court and contribute to the expenses of the suit, filed a bill against George Peter, surviving executor, against the heirs or devisees of David Peter, and against John Marbury, trustee as aforesaid, stating that the personal estate of the said testator had been applied to the use and benefit of the heirs by the executors, in the fulfilment of the trust created by the will, and claiming that the real estate of the said testator, or the proceeds thereof, or as much as might be necessary, should be applied to pay whatever balance might remain due to the creditors, after selling and applying to that purpose the proceeds of the city lots and the land upon which Dulin lived. It prayed, also, an injunction against Marbury, and for other and general relief.

In April, 1836, the following agreement was made between the counsel of the respective parties, and filed in the cause.

Agreement of Counsel.

It is agreed by the parties in this cause, by their counsel, that the Bank of the United States and George Peter, who claim to be creditors of the estate of the late David Peter, for a balance of debt which may remain to them after the application of the trust estate provided in the will of the late David Peter for the payment of his debts, shall, if such balance be established against the defendants, the heirs and devisees of David Peter, as to so much of David Peter's real estate as is conveyed to John Marbury, by deed filed as an exhibit with complainant's bill, look to the proceeds of sales of said real estate so conveyed to the said John Marbury, in lieu and stead of the said real estate itself.

It is further agreed, that as soon as the purchase-money of said real estate shall become payable and be collected by said John Marbury, he shall invest the same in his own name, as trustee, in Pennsylvania State stock, bearing interest at the rate of 5 per cent., first deducting therefrom the necessary expenses, taxes due on the said property, to the day of sale, and the commissioners provided for in the said deed; the whole of the proceeds of the said sales, after such deductions made, to be subject to the order and decree of this court in this cause for the disposal thereof, whether the said order or decree be for the payment of debts due from the said estate of David Peter to the Bank of the United States, or to George Peter, or other person, or from the said heirs and devisees, or either of them, to the said Bank of the United States, or George Peter, or either of them, on account of any portion of the personal estate of said David Peter, used or retained by them severally; provided, also, that it is the true intent and meaning of this agreement, that the part, portion, or interest of each of said heirs and devisees, should be responsible only for so much of the claims and debts of said heirs and devisees, to said Bank of the United States, or George Peter, as he or she shall be personally responsible for; and that no one shall be held or deemed responsible for any other than him or herself.

It is further agreed, that the Bank of the United States, or George Peter, or either of them, by themselves or their agent,

may stop or postpone the sale of any portion, or the whole, of the property advertised for the 15th inst., or any future attempted sale of property so conveyed to said John Marbury, if they, or either of them, should be dissatisfied with the prices bid, or offered, for said property, or any portion thereof; provided, however, that all the said property shall be sold during the present year, unless the said bank and George Peter consent to further delay.

It is further agreed, that the three story brick house and lots appurtenant in Washington City, set forth in said deed to John Marbury, as devised in trust for William H. Peter, shall be sold jointly by the said John Marbury and the said George Peter, sen., executor of David Peter, and upon the terms mentioned in the deed to said John Marbury; and that the proceeds of the sale of the said house and lots appurtenant, after deducting expenses and taxes, shall, when the same becomes due and is collected, be invested by the said John Marbury and George Peter, in their joint names as trustees, in five per cent. stock of the state of Pennsylvania, to abide the order of this court for the disposal of the same. The said John Marbury to charge no commission on the proceeds of said sale, if the court shall be of opinion that the said house and lots appurtenant be part of the real estate of David Peter; and the said George Peter to have no commission on the proceeds thereof, if the court be of opinion that the same is the property of the estate of William H. Peter, deceased.

It is understood and agreed, that nothing herein contained is to be taken to amount to an admission by the defendants, the said heirs and devisees, or either of them, that any debt is due from them, or either of them, to the said complainants or the said George Peter; or to prevent them, or either of them, from having the benefit of the statute of limitation, by plea or answer, or any other defence, legal or equitable, against the enforcement of the claims of the complainants, or George Peter, except that the said defendants, the said heirs and devisees, do hereby waive any exception to the jurisdiction of the court, as to the personal estate in this agreement mentioned.

F. S. KEY, *for United States Bank.*

JAS. DUNLOP, *Solicitor and Trustee for Geo. Peter.*

JOHN MARBURY, *Sol'r for heirs, and devisees, and himself.*

April 12th, 1836.

Afterwards all the defendants answered. George Peter, the executor, claimed to be a creditor of the estate; Marbury admitted the execution of the deed to him and the sales under it; and the devisees, Beverly and others, pleaded the lapse of time and the statute of limitations as a full and complete bar against the claim of the complainants. They also denied all knowledge of an arrangement with the Bank of Columbia; required proof of it; denied the authority of the executors to cast any further burden upon the real estate, than such as would result from a deficiency in the personal estate; denied that the executors applied to the bank for indulgence; averred that the negligence of the executors alone prevented the recovery of the purchase-money of the farm from Magruder; averred that the children of David Peter were minors at the time of his death, and incapable of consenting to any arrangement whatever with the banks; that Beverly had no knowledge of, or interest in, the property until 1819, when his marriage took place; that they were never able to acquire any information, and never did, of the complicated affairs of the estate; praying that the decree of the court, dismissing a similar bill in 1827, may be as effectual as if formally pleaded; averring that any agreement with the banks could affect nothing more than the trust part of the real estate; they deny the authority of the court to decree a sale of property situated in Maryland; aver that the executors received large sums of money for which they have rendered no account; that no part of the personal estate came into the possession of Beverly since his marriage; that if any part of it came into the possession of his wife before her marriage, it was very inconsiderable indeed; and that the personal estate continued principally in the possession of George Peter, the executor, by whom it was used, wasted, and otherwise disposed of.

On motion of the complainants, by their solicitor, the Circuit Court ordered "That the decree of the Supreme Court, and the bill, answers, exhibits, depositions, and proofs in the case of Beverly *v.* Peter in the said record, and on file in the said cause, be read and made use of in the hearing of this cause."

In January, 1840, the papers in the cause, with the evidence already taken and on file, were referred to the auditor to state an account between the parties upon the principles of his former report, and in November, 1840, he reported as follows:

Auditor's Report.

The Bank of the United States and Peter, v. The Estate of David Peter, deceased. } In chancery..

The undersigned auditor of the Chancery Court for Washington county, District of Columbia, has had the papers filed in this cause under examination, and now submits the following report:

That the claim of the Bank of the United States against the estate of David Peter, with interest to the 12th day of November, 1840, and costs, is $46,119 75; and that the claim of George Peter, per statement herewith, is $26,607 78. That the net proceeds of the sales of property sold by George Peter, as executor, is $17,513 66, to which may be added the estimated value of two thousand acres of land in Montgomery county, Maryland, called Dulin's, (which originally sold for a little upwards of $20,000,) $7500; of vacant lots in the city of Washington, $1500, and $2873 15 being the amount awarded to the proprietor of Dulin's farm by the Chesapeake and Ohio Canal Company, for damages done by running said canal through that farm, which sum has never been paid by the executor of David Peter. These several items, if the property brings this estimated value, will make the sum of $29,386 81 for trust estate.

That the sales made by John Marbury, under an agreement made by the parties to this cause, as per report of sales, amount to $41,731 86, but owing to the non-compliance with the terms of sale, of some of the purchasers, the corrected sales as specified in Mr. Marbury's account No. 2, the amount is reduced to $38,722 32; the whole amount of the payments received by Mr. Marbury up to the 20th April, 1838, is $21,711 16, from which deduct, for expenses, taxes, surveying, auctioneer's bills, and the trustee's commission $1,804 76, leaving in the hands of the trustee, $19,906 40, which amount, according to his report, has been vested in the stock of the state of Pennsylvania, bearing interest at 5 per cent. per annum. The corrected sales, as above, amount to $38,722 32, to which may be added as follows: Wm. Ramsay's purchase of lots, $2084, and Wm. Stewart's, $501, which still remain for the trustee to dispose of, and if they bring the same at which they were struck off at to Ramsay and Stewart, will make, when added to the $38,722 32, the

sum of $41,307 32 as gross sales; in addition to this sum, there remains twenty-four acres of land, near the city of Washington, bought at the sale by Mr. Upton, who never complied with the terms of sale, and never has paid for, which it is believed will sell for $1000; this will make the trustee's sales amount to $42,307 32, and taking the expenses, commissions, &c., as before mentioned, it will leave in the hands of the trustee the sum of $40,502 56. That it thus appears, that the sales of George Peter, acting under the will of David Peter, amount, if the sales shall be equal to the estimate here given, will be $29,386 81, and those by Mr. Marbury, $40,502 56. To these sums are to be added the amount of interest received on the notes given in payment, and the interest on the Pennsylvania stock.

The auditor has read and considered the pleas of limitation put forth by the answers of the heirs of David Peter, and by John Marbury, Esquire, as their solicitor in this cause, and is of opinion that it is not available, under the circumstance of this case, as it respects either of the creditors.

Submitted by JOSEPH FORREST, *Auditor.*

10*th November*, 1840.

In the audit of the 10th December, 1833, the executors are charged with the following, being for property sold in the city of Washington to sundry persons, viz.: Shaw and Elliot, lots $1000; J. Kuhn, $796 86, and Francis Dodge, $175, making in the whole $1971 86. It is contended by George Peter, the surviving executor, that he never received this amount, or any part thereof, but that the same was received by the heirs; as Major Peter gave deeds to the purchasers, the auditor is of opinion, that it was rightfully charged in said audit. This amount the executor can bring into his settlement with the heirs, but not into a settlement with the creditors of the estate.

JOSEPH FORREST, *Auditor.*

10*th December*, 1840.

Whereupon the complainants, by their solicitor aforesaid, filed the following exceptions to the auditor's report:

Complainants' Exceptions.

Because the auditor has charged George Peter, surviving executor, with the purchase-money of the lots sold to Kuhn and

Birth, when it was proved, that the same was not received by him, but by James B. Beverly, or was applied by him to the payment of debts of the deceased, for which the executor is not credited. F. S. KEY, *for complainant.*

Whereupon the said defendants, by their solicitor aforesaid, filed the following exceptions to the auditor's said report, to wit:

Defendants' Bill of Exceptions to Auditor's Report.

Exceptions on the part of the heirs at law and devisees of David Peter, defendants in the above cause, to the report of Joseph Forrest, Esq., auditor, made in this cause, and filed the day of November, in the year 1840. The said defendants except to the said report,

1. Because the auditor has allowed a claim or debt of $46,119 25, in favour of the complainants, the Bank of the United States, against the estate of the said David Peter and the defendants, his heirs and devisees, without legal, competent, and proper evidence of the existence of such debt, or of any debt whatsoever, due from the said David Peter, in his lifetime, and with the payment of which these defendants ought to be charged in this suit.

2. Because, in stating the said pretended debt or account, between the complainants and the said defendants, the heirs and devisees of the said David Peter, the auditor has allowed compound interest, and thus, unjustly, illegally, and oppressively increased he said pretended debt.

3. Because, if any such debt was due from the said David Peter, in his lifetime, and at the time of his death, which happened in the year 1812, the recovery of the same against these defendants, as the heirs and devisees of the said David Peter, in consideration of any real estate descended from, or devised by the said David, to these defendants, was barred by lapse of time and the provisions of the act of limitations; and although these defendants, in their answer to the bill of complaint, and at the hearing before the auditor, insisted on the lapse of time and the provisions of the act of limitations, in bar of the said debt or demand of the complainants, the auditor rejected their said defence, and allowed the said debt or demand.

4. Because George Peter, the surviving executor of David Peter, and one of the defendants to the said bill of complaint,

having elected to come in and contribute, with the complainants, to the expenses of this suit, filed an account as a creditor of the estate of the said David Peter, amounting to the sum of $26,607 78, which said sum of $26,607 78, the auditor has allowed as a just and proper charge against the estate of the said David Peter, and for the payment of which, the real estate, devised by the said David to these defendants, ought to be sold. Whereas, these defendants say, that there is no evidence in the cause to prove the same, or any part thereof, to have existed as a debt against the said David Peter in his lifetime, or to authorize a decree for the sale of the real estate devised to these defendants, by the said David, for the payment of the same.

5. Because, each and every one of the items of charge contained in the account of the said George Peter, so allowed by the auditor, was of more than three years' standing before the filing of the said account, by the said George Peter, with the auditor, and before the filing of the bill of complaint in this cause by the Bank of the United States, against these defendants and the said George Peter, and was, at the time of the filing of the said bill of complaint, barred by lapse of time and the provisions of the act of limitations; and these defendants, at the hearing before the auditor, and before the making of his said report, as appears by the said report, insisted on the lapse of time, and the provisions of the act of limitations, as a bar to the claim of the said George Peter; notwithstanding which, the auditor allowed the same.

6. Because the report of the auditor and the account accompanying the same, are not in pursuance of the order of reference to the auditor, but relate to claims and accounts not embraced in such reference.

7. Because the said report, accounts and statements, accompanying the same, are unsupported by legal and competent evidence in the cause, and therefore ought to be set aside.

8. Because the sum allowed to George Peter, as surviving executor of David Peter, by the auditor, is for a general balance on the settlement of the executor's account, as is alleged, for that amount overpaid the proceeds of the estate which came to the hands of the executors, to be administered; and the defendants, as heirs and devisees of the real estate of the said David Peter,

are not chargeable by the executors, or the survivor of them, with the payment of such balance. JOHN MARBURY,

Solicitor for the heirs and devisees of David Peter.

On the 21st of January, 1841, the cause came on for hearing on the exceptions to the auditor's report, and the bill, answers and exhibits, depositions and proofs and general replication; when the court decreed that the exceptions to the auditor's report, made by complainants, be overruled, and the exceptions of defendants to the auditor's report be confirmed; and that the bill of the complainants be dismissed with costs.

From that decree the complainants appealed to this court.

Jones and *Sergeant*, for the appellants.

Cox and *Reverdy Johnson*, for the appellees.

The counsel for the appellants made the following points. That the court erred.

1. In overruling the exception of complainants.

2. In confirming the exceptions of defendants, the claims of the bank and of George Peter being sustained in the record by the proof as reported by the auditor.

3. In dismissing the bill—

Because: 1. The bill filed in 1827, and the proceedings thereon, were no bar to the relief now sought.

2. Lapse of time and the statute of limitations could not, under the circumstances of the case, operate as a bar.

3. Under the arrangement made between the banks and the executors for the benefit of the heirs, and according to the provisions of the will, the personal estate might properly be applied to the maintenance of the heirs.

4. If so applied (as it was) the real estate was liable to the debts, whether specifically so directed by the will, or not.

5. On that part of the real estate specifically directed to be sold for the payment of the debts appearing to be insufficient, the rest of the real estate was liable; and it was not necessary, in such case, to wait till an actual sale ascertained the extent of the insufficiency.

6. All these grounds were maintained in the opinion of this court in the former case between these parties.

In that case the court determined that the real estate specifi-

cally directed to be sold to pay debts, was liable to be sold for that purpose.

This bill avers the insufficiency of that part of the real estate (it having been sold) to pay the debts; which is not denied in the answer. And the appellants contend that, under the will and by the laws of Maryland, the residue of the real estate is liable to the extent of the insufficiency.

Jones argued that the act of Maryland of 1785, gave to simple contract creditors the same remedy against heirs as specialty creditors. The heirs and devisees in this case consumed the personal fund, and the testator intended it should be so. He had, in effect, alienated his personal estate from the payment of his debts. Where the legatees have a lien, they must resort to it: 1 P. W. 679; 2 Powell on Devises, 654. The executor can come in as a creditor. 3 P. W. 398; 3 Gill and Johnson, 324; 6 Gill and Johnson, 4. The plea of limitations cannot avail, because the will creates a trust to pay debts which consists mainly in a charge upon the real estate. The form of making the trust is not material. If there is a charge upon the land and no trustee, the court will appoint one. 13 No. of Law Library, page 10.

Coxe, contra.

The proceeding is exclusively upon the statute of Maryland of 1785, and not upon that of George II., making real estate subject to execution. But the debt must be in existence at the death of the testator, and the executor's claim, here, has arisen since. See 1 Harris and Johnson, 469; 2 Bland's Chancery, 327. In 1 Harris and Gill, 504, the petition was dismissed because it did not aver a deficiency of personal assets. The Court of Appeals reversed this, but only upon the ground that the deficiency might have been proved. But here it is neither averred nor proved. See 1 Bland, 415; 2 Bland, 250, 472; 4 Gill and Johnson, 296. In 8 Poters, 144, the court consider this act of 1785 as an enlargement of chancery powers, and say that the real estate is to be sold only when there are no personal assets. This claim was not against the testator; he died in 1812, and the Bank of the United States was not chartered until 1816. If it be by assignment, none is shown. If a guardian to the infants had been appointed, he could not have touched the real estate. How, then, can the

executor involve it? Law Reporter of March, 1840, page 1. As to limitations: there is only a general replication filed, and no special matter set forth in avoidance of the plea. The argument on the other side cannot therefore come in. 6 Peters, 64, says, "where the statute is pleaded, replication or amended bill must set forth the facts to take it out of the statute." As to the effect of limitations, 1 Bland, 91, 470; 2 Bland, 366; 8 Peters, 528; 3 Cond. Ch. Rep. 155; 4 Harris and Gill, 126, 270; 2 Gill and Johns. 491. As to a trust reviving a debt barred by statute, 1 Russell and Mylne, 255, or 4 Cond. Ch. Rep. 413. The bill does not aver a trust; and if there be one, who is the trustee? If it is the executor, the bill ought to have been against him alone. 2 Johnson's Ch. Rep. 614, 623, and authorities there cited.

R. Johnson, same side, examined,

1. Whether the case as presented by the bill could be sustained, supposing the creditors to be the creditors of the testator at his death.

2. Whether they were in fact such creditors.

3. Whether the answer and proof did not meet the averments of the bill.

4. Whether the complainants could come upon the real estate either upon the ground of an assigned claim to the bank, or that the executor had overpaid.

1. The complainants can succeed only upon one of two grounds—upon the act of 1785, or that there was a general trust created. It is settled in Maryland, that under the act of 1785 there must be an averment and proof of a deficiency of personal assets. 1 Harris and Gill, 504. But here the bill says there was a large personal estate. As to a general trust—how can that be, when there is a particular part of the estate devised to pay debts, if necessary? Testator died in 1812, and bill filed in 1836; in the mean time the debt has accumulated, by interest, to $46,000; the executor is a creditor to $26,000, making $72,000. The trust property is estimated at $29,000; the personal estate, which the testator thought might be insufficient, all gone, and the general estate is to make up $43,000. The whole estate will not pay the debt.

2. They were not creditors of the original estate. The executor's account begins in 1813, after testator's death, and the

other creditors claim by assignment; but none is shown. See 7 Harris and Johns. 134; 4 Gill and Johns. 303; 6. Gill and Johns. 4.

3. Answers rely upon limitations and lapse of time. Morrison *v.* Bell, 1 Peters, decided that the court would not try to get out of the statute, and in Gray and others, 1 Harris and Gill, adopts the same principle. Can the creation of a trust upon a part of the estate prevent the statute from protecting the rest? Did not the testator intend that his debts should be soon paid, and the residue of his estate go to his children, free from debt? Between the *cestui que trust* and the trustee, the statute stops; but if other parties are brought in, it is different. If it is the law which makes this property responsible, then it is not the intention of the testator; and if so, there was no trust, and the statute must run. 2 Story's Equity, 735, note; 2 Sch. and Lef. 630.

4. The dismissal of a former bill is a bar to this. 2 Story's Equity, 740; Cooper's Pleading, 269—271; Mitford, 237.

Sergeant, in reply, for appellants.

The hardship of this case is not on the side of the defendants; it is one of obstinate ingenuity on their side. Debt has never been paid, and children have had the benefit of the personal estate. No mismanagement of the fund anywhere. The creditors are worse off than the family. The Bank of Columbia broke along ago; if it had exacted its debt immediately, it would have been called a Shylock. The respondents are residuary devisees; the testator first provides for his wife, and then for his debts, and the will is the law of the case. (Mr. S. here gave a history of the case.) The bill does not profess to be under the act of 1785. There was a special agreement of counsel, in which the defendants waived any objection to the jurisdiction of the court, &c.: they cannot now deny that the debt was due by the testator. We were entitled to the real, in aid of the personal, in 1813, and are so still. A devise of a part of the land to pay debts does not exempt the rest. Whoever takes the land takes it as a trustee. Jones *v.* Scott, 1 Russell and Mylne, says, that the intention of a testator to make a trust, prevents the statute from running. See 2 Story's Equity, 737, 741. The question in the case is, whether the executor shall be ruined, and the legatees

get the land for nothing. The family all concurred in what was done: the heirs and devisees had as much right as we had to go into chancery and have the estate settled up. As to the former suit being a bar, the record does not show any thing but the answer, or whether it was dismissed "without prejudice."

Mr. Justice BALDWIN delivered the opinion of the court.

A summary of the points decided, and principles settled in the former case between these parties, will save much time in the investigation of those which are involved in this.

After taking a condensed view of the will of David Peter, the court declare, that he had unquestionable right, so far as respected his children, to charge the payment of his debts upon any part of his estate he might think proper, and that none but a creditor could control his will in that respect; that he had constituted his widow the trustee of the proceeds of all his estate, for the maintenance and education of his children; and invested her with unlimited discretion in this respect, so far as the proceeds of his estate would go. Whereby the surviving executor is not accountable for any thing so applied by her, even if she would be chargeable with a *devastavit*, and that the proceeds of all his estate being thus vested in the widow, would render it necessary, independent of any express direction in the will, that recourse be had to the real estate for the payment of the debts. 10 Peters, 562, 563. The court then decide, that the surviving executor had power to sell, and that it was impossible to draw any other conclusion, than that it was the intention of the testator that the sale should be so made. 10 Peters, 566. On the inquiry whether there is any subsisting debt due from the estate of David Peter to the banks, the court say, there is no pretence that they have been paid in fact, and if not, the trust remains unexecuted, and the land still remains charged with it. If the executors have paid the banks, or the banks have accepted their notes in payment of the notes of the testator, the only effect is, that the executors became the creditors instead of the banks, and may resort to the trust fund to satisfy the debt. But the court also say, that under the circumstances of the case, there is no ground for considering the debt of the banks to be extinguished, and they then proceed to state the result of their consideration to be this.

That the will created a power coupled with an interest that survives; that the surviving executor is the person authorized to execute that power and fulfil that trust; that the debt due the banks has not been extinguished, or the estate in any way discharged from the payment. That the executors are not chargeable with negligence or such misapplication of the personal estate as to make them responsible for the payment of these debts; and that from the auditor's report on the accounts of the executors, exhibited to, and allowed by him, there has at all times been, and now is, a considerable balance in favour of the executors against the estate. The court, then, refer to the exceptions taken to the auditor's report, and declare them to have been properly overruled by the court below, and proceed to render their decree as before referred to. 10 Peters, 569, 570.

So far, then, as related to the construction of the will, the disposition of the personal property, the charge of existing debts on the real estate, the power of the executor, the existence of a trust, and their duty to execute it by a sale of the property charged by the will, the decision of the court has settled the rules and principles on which the present controversy must be determined if they are applicable; it was made on great consideration, founded on authority, and nothing which has been urged in the argument of this case has caused us to entertain the least doubt of its entire conformity to the well established law of equity. So far as the evidence and facts of that case were considered and adjudicated, the decree of this court is final and conclusive; the parties and the subjects of controversy between them were the same as are now before us; negligence and misapplication of assets were charged on the executors, the existence of debts to them or the banks was denied by the then complainants, and now defendants, and both facts adjudged and decided adversely to them; and the auditor's report was confirmed, whereby every fact it contained became established and binding on the parties in any future controversy, as to any matter thus adjudicated.

In Hopkins *v.* Lee, this court state the settled law of all courts to be, that, as a general rule, a fact which has been directly tried and decided by a court of competent jurisdiction, cannot be contested again between the same parties, in the same or any other court. Hence a verdict and judgment of a court of record, or a

decree in chancery, although not binding on strangers, puts an end to all further controversy concerning the points thus decided between the parties to such suit. In this, there is, and ought to be, no difference between a verdict and judgment in a court of common law and a decree of a court of equity. They both stand on the same footing. 6 Wheat. 113, 114; S. P. 1 Wheat. 355; 12 Peters, 492. Whatever, therefore, our opinion might now be as to the facts adjudicated in the former case, the judicial power is incompetent to revise the evidence on which the decree was rendered, on any ground now set up in the answer of the defendants, or apparent on the present record, and they must be taken to be beyond all controvery in this or any future case between the parties. Before proceeding to consider the questions appropriate to this cause, a reference to the case of Fenwick *v.* Chapman, 9 Peters, 466, will be useful, in order to ascertain what principles were there laid down and are applicable to the present controversy. Adopting the general rule that the personal estate of a testator shall in all cases be primarily applied to the discharge of his personal debts or general legacies, unless he by express words or manifest intention exempt it, the court thus qualify the rule; where the testator's intention clearly appears that a legacy shall be paid at all events, the real estate is made liable on a deficiency of personal assets. So where without any assistance from the will, the nature of the thing to be done may clearly show the intention to charge the real estate with a debt; as, where the thing to be done cannot be partially performed by the executor, without defeating the instruction which directs it, and the thing itself. On this principle the court holds, that the manumission of slaves pursuant to the directions of a will under the law of Maryland (which is the law of the eastern part of this district) operates as a specific legacy to the slaves, and to charge the real estate with the payment of the debts of the testator, even though he may have, at the time of his death, no other personal property than slaves. 9 Peters, 471, 473. That the creditor may be carried into a court of equity, or voluntarily resort to it to obtain his debt, either from the lands or the personalty, when the testator leaves it doubtful from what fund his debts are to be paid; that lands devised for the payment of debts, or which have become chargeable by implication, constitute

a fund for the payment of debts, and an ample and plain remedy is admitted to exist in the law of Maryland, so to apply them.

"The will is the executor's law, and he is no more than the testator's representative in all things lawful in the will. A special legacy of all the personal property is a law to him;" if there is an insufficiency of "personal assets to pay debts, it is the executor's duty to file a bill against the creditors and all interested in the estate;" "praying that the lands may be made liable to the payment of debts, that equity may be done to all concerned, according to the law of equity." 9 Peters, 474, 475. When he is charged with the sale of the testator's lands for the payment of debts, it is his duty to execute the whole of the testator's will, and in such a case the creditors have as good a right to look to the land through him for the payment of their debts, as they have to look to the goods and chattels through him, 9 Peters, 477; and they must pursue their claims in equity, or according to the statutes of Maryland subjecting real estate to the payment of debts, to make their debts out of the land. 9 Peters, 481, 482. These statutes are the 4 Geo. 2, adopted in Maryland, and the act of 1785, c. 72, sect. 5, which is recited in the Bank of the United States *v.* Ritchie, 8 Peters, 143, and which this court there declare has been construed in that state to be an enlargement of jurisdiction, and that decrees for selling the lands of minors and lunatics, in the cases prescribed by it, have been treated by the Court of Appeals, as the exercise of other equity powers. That these opinions of this court are in accordance as well with the statutes of Maryland, and the established rules of equity in cases of this description, we have no doubt; nor of their application to the present. It must therefore be taken to be a settled point, that a disposition by a testator of his personal property to purposes other than the payment of his debts, with the assent of creditors, is in itself a charge on the real estate, subjecting it to the payment of the debts of the estate, though no such charge is created by the words of the will. A trust is thereby raised which devolves on the executor, who may execute it by his own authority, or be compelled to do it by a bill filed by the creditors, either under the statute of 1785, or in virtue of the powers of a court of equity in relation to the execution of trusts, as the case may be; in this case there was such a trust fastened on the pro-

perty in controversy by implication of law, and the presumed intention of the testator, which can be enforced by these complainants, unless some valid objection has been made out by the respondents.

It has been contended that the frame of the bill is too defective to justify any action upon it, for the want of necessary averments, but when we take it in connection with the former cause to which it refers, the agreement of the parties on file, and the answer of the defendants, we think that a satisfactory answer is at hand. The object of the bill is clearly stated, such averments are set forth as on its face shows some equity which requires an answer; informal as they may be, they would stand the test of a demurrer, especially with the aid of the agreement, by which it appears that the defendants fully understood the nature of the plaintiff's case, the object sought, and the evidence on which they would rely. The answer is full to every matter of fact or law which could be averred in the best drawn bill; there has been no allegation of surprise, or any want of notice of the grounds on which the plaintiff rested his case, and the parties went to the hearing on the bill as it stood, fully prepared to contest their respective claims, as they had done in the first case, of which this was well known to be the consequence. Under such circumstances the objection is entitled to no favour, and is not sustainable as an obstacle to our action upon the merits of the cause.

The answer sets up the dismission of a bill filed by the complainants in 1827, against the defendants, for the same relief as is prayed for in the present bill, as a bar thereto; but no record of such case is set out or exhibited, so that, however true the answer may be in fact, it cannot avail in law. In this respect it is not responsive to the bill; it sets up distinct affirmative matter of defence and bar, which the defendants must prove, or it can have no effect for either purpose.

The statute of limitations, and the loss of time from the death of David Peter to the filing of the bill, are also plead and relied on as a bar, but we think that neither can apply to this case, which is an unexecuted trust for the payment of debts adjudged by this court in 1836, to be unpaid in point of fact, and then existing in favour of the banks and executor, and the present bill was filed soon after the decision was made. The confirmation of the au-

ditor's report, made in that case, is conclusive to show the amount of such debts at that time; so is his report in this case as to their present amount: we cannot look through these reports for the evidence on which they were made; they have passed to judgment, and have the sanctity of records.

The remaining objections to the relief prayed for by the bill, which are founded on the principles of the law or the rules of equity, are covered by the former decisions of this court; those which arise from the evidence in the cause as to matters of fact material to our decision, are no longer open to controversy, and we are clearly of opinion that the complainants have made out their case in point of law and fact.

The decree of the Circuit Court must consequently be reversed. The cause is remanded with directions to make a decree in conformity with this opinion, by ordering a sale of the property in controversy, and consistently with the agreement of the parties filed of record, and the rules of equity as to the time of disposing of the several parts thereof, specifically devised by the will of David Peter. It is also directed, that the Circuit Court decree on the report of an auditor, or as they may think proper, to what part or items of the account of George Peter, a preference ought to be given in payment over the other creditors of the estate of the testator, and make a final order thereon according to law and equity.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Washington, and was argued by counsel. On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court in this cause be and the same is hereby reversed, with costs, and that this cause be and the same is hereby remanded to the said Circuit Court, with directions to proceed therein according to the opinion of this court, and in conformity to the principles of law and justice.

JOHN LLOYD, PLAINTIFF IN ERROR, *v.* GEORGE S. HOUGH.

The action of assumpsit for the use and occupation of lands and houses, existed in Virginia anterior to the cession of the District of Columbia to the United States.

But this action is founded upon contract, either express or implied, and will not lie where the possession has been acquired and maintained under a different or adverse title, or where it was tortious and makes the holder a trespasser.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Alexandria.

The facts in the case, and bills of exceptions, are stated in the opinion of the court, to which the reader is referred.

Semmes, for the plaintiff in error.

Neale, for the defendant.

Semmes, for the plaintiff, raised the following points.

First bill of exceptions.—There was error in the opinion and instructions of the court.

1. Because the instruction was not given upon the whole of the evidence of the witness, Isaac Robbins, but upon only part, which he gave upon cross-examination by the defendant in error.

2. Because the court allowed parol evidence of title to real estate to go to the jury.

3. Because in the opinion and instruction they gave on this portion of the evidence, the court directed the jury, if they believed the testimony therein stated, they "must" find for the defendant.

Second bill of exception.—The court ought to have instructed the jury, that if they believed the evidence therein stated to be true, the plaintiff, being the fee simple owner of the tenement, could recover on the implied contract as stated in the second count of the declaration, without any proof of an actual entry into the premises on the part of the plaintiff, or acknowledgment on the part of the defendant that he considered the plaintiff his landlord, or without any proof that the defendant had actual notice of the legal and fee simple title of the plaintiff to the premises.

Third bill of exception.—Evidence ought to have been admitted to show the notoriety of Lloyd's claim and title, tending, with other circumstances, to bring the knowledge of it home to the defendant.

Fourth bill—governed by same principles as second.

On the right of the jury to weigh evidence, he cited Greenleaf, p. 292, 445, 446, 568; 1 Call, 161; 2 Mod. 478.

That an action will lie on an implied promise, 16 East, 104; 1 Levins, 179; 2 Campb. 18; 1 Campb. 466. Debt lies for use and occupation, 6 T. R. 62; 4 Day, 228.

Neale, for the defendant, cited several authorities to show that interest could not be recovered upon rent in arrear; and to prove that this action would not lie where there was no privity of contract, cited 1 Esp. 57, 59, 61; 2 Nott and McCord, 156; 3 Serg. and Rawle, 500; 6 Conn. Rep. 1; Chitty on Contracts, (3d Am. ed. by Troubat,) 106; 2 Tuck. Com. book 3, c. 1, p. 19, 20; 2 Campb. 11, 12; 1 Campb. 466; Buller N. P. 139.

As to the court directing the jury they must find for the defendant, 5 Peters, 197; 14 Peters, 327; 1 Cranch, 300; 4 Cranch, 71; 4 Leigh, 114; 1 Wash. 5, 6; 5 Rand. 145, 194.

Mr. Justice DANIEL delivered the opinion of the court.

This cause is brought before this court upon a writ of error to the Circuit Court of the United States for the District of Columbia. The questions for consideration here, arise upon the following statement. The plaintiff in error instituted in the Circuit Court for the District of Columbia, an action of *assumpsit* against the defendant for the use and occupation of a house in the town of Alexandria. The declaration contains two counts, the first declaring upon an express agreement between the parties for the occupation and rent, and the second counting upon an occupation by the defendant by the permission of the plaintiff, and upon a promise in consideration thereof. The account filed with the declaration claims an annual rent of $175, from the 1st of January, 1826, to the 1st of January, 1839, inclusive, with interest after the expiration of each year. Upon the above declaration, there was a judgment by default, and a jury being empannelled upon a writ of inquiry assessed damages against the defendant to the

full amount of the plaintiff's demand for rent and interest. This verdict the court on motion of the defendant set aside; annexing to its order the condition, that the defendant should not plead the statute of limitations; and issue being joined between the parties on the plea of *non-assumpsit*, a jury sworn to try that issue on the 10th of May, 1841, returned a verdict for the defendant; and thereupon the court gave judgment against the plaintiff with costs.

At the trial instructions to the jury were prayed on behalf both of plaintiff and defendant, and exceptions taken to the rulings of the court in reference to those instructions.

The first bill of exceptions states that the defendant, having offered to prove by competent and credible witnesses that during the entire period of his occupation of the premises, he had remaining thereon property sufficient to answer the rent, had the plaintiff chosen to distrain or sue for the same; he thereupon prayed the court to instruct the jury, should they believe from the evidence, that there had always been upon the premises, while occupied by the defendant, property and effects of his sufficient to have satisfied the rent, then that the plaintiff failing or neglecting to sue or distrain for those rents, was not entitled in this action to recover interest on the rent in arrear whatever it might be, from a period earlier than the date of the writ sued out in this cause. But the court refused the instructions so prayed for, to which refusal the defendant excepted.

In the second bill of exceptions it is stated that the defendant, by cross-examination of Isaac Robbins, the plaintiff's witness, proved that in the spring of 1820, defendant entered the premises as tenant, from year to year, under a parol demise from said Robbins as trustee of John Swayne, an insolvent debtor, and at the annual rent of $175, and continued to occupy the premises under said demise, paying the rent as it became due to Robbins, as trustee of Swayne, till the spring of 1824. That Robbins, in character of trustee of Swayne, paid a portion of the rents collected of the defendant to A. C. Cazenove, and a part of them to the plaintiff, but without the knowledge of the defendant: that since the spring of 1824, the defendant had paid no rent to Robbins, assigning as a reason for refusing to pay, that the collector of the port of Alexandria had forbidden such payment: that the

defendant was still the occupant of the premises of which the plaintiff in this cause had never, to his knowledge, taken actual possession: that Robbins resided in Alexandria and had so resided for the last thirty-seven years: that the defendant also read in evidence a deed from Jonathan Scholfield and wife, to A. C. Cazenove, bearing date on the 13th of June, 1814, and duly recorded in Alexandria county, which deed (made a part of the exceptions) conveyed the premises occupied by the defendant. That upon these proofs the defendant prayed the court to instruct the jury, should they believe that the defendant originally entered, and used and occupied the premises by a parol demise thereof from Robbins, as trustee of Swayne, in 1820, and, as tenant of Robbins, paid him the rent until 1824, after which period Robbins ceased to collect the rent for the reason above stated, although the defendant continued to use and occupy the premises from 1824, and still occupied them; and that the defendant did not hold and occupy the premises either under a written or parol demise from the plaintiff prior or subsequently to his holding under Robbins, or prior to the institution of this suit, but that the defendant held and occupied the premises exclusively under the original parol demise from Robbins as trustee as aforesaid, and that the defendant had no notice of any title in the plaintiff to the premises beyond what might be presumed from the fact then shown in evidence, that a deed had been made for the premises from Robert I. Taylor to the plaintiff and had been admitted to record, that then the jury must find for the defendant, which instruction the court accordingly gave, and the plaintiff excepted.

By the third bill of exceptions it is recited in substance that the plaintiff having offered in evidence a deed to him for the premises, dated March the 10th, 1817, from Robert I. Taylor, trustee in a deed from Jonathan Scholfield and wife, conveying the same property to said Taylor on the 26th of June, 1814, (both which deeds are parts of this exception,) and having farther proved by Isaac Robbins that from the year 1820 to the year 1824, the defendant used and occupied the premises in the declaration mentioned under a verbal renting from Robbins, claiming as trustee of Swayne under the insolvent law, and that said renting by Robbins was without the knowledge or consent of the plaintiff,

(no title having been shown by the defendant in Swayne or in Robbins claiming as his trustee under the insolvent law,) and that Robbins collected the rent of the premises from 1820 to 1824 inclusive, claiming as lessor of the defendant, and as trustee of Swayne; that he had paid over a portion of the rent thus collected to A. C. Cazenove, and a portion of it to the plaintiff, who was the owner of the fee simple under the deed from Taylor, of March the 10th, 1817; the witness not knowing whether the defendant knew of the disposition so made of the rent collected of him, and that he, Robbins, had not claimed rent for the premises from the defendant since April, 1824, having been informed that defendant had been forbidden by the collector of the customs of the port of Alexandria, to pay rent to any one, other than the United States, and not having shown that the defendant had, at any time, paid rent either to the collector or the United States.

Whereupon, the plaintiff prayed the court to instruct the jury, should they believe the evidence aforesaid, that then the plaintiff had made out such a case as entitled him to recover on the second count, for the use and occupation of the premises, for such time as the plaintiff should prove that the defendant had used and occupied the same, after the 15th day of April, 1824, by permission of the plaintiff. This instruction the court also refused to give, being of opinion that from the evidence so stated, it was not competent for the jury to infer that such occupation by the defendant was by the permission of the plaintiff, to which opinion and refusal the plaintiff excepted.

Fourth bill of exceptions.—The plaintiff offered to prove that the claim of the plaintiff to the premises, for the rent of which this suit was instituted, was a subject of general notoriety in the neighbourhood about the year 1820 and since, which being objected, the counsel for the plaintiff insisted he had a right to ask the question objected to, it being introductory to another question designed to bring home to the defendant knowledge of the fact, that the plaintiff claimed the premises used and occupied by the defendant during the time he so used and occupied them. The court refused to permit the question, to which refusal the plaintiff excepted.

By the fifth and last bill of exceptions it appears that the plaintiff moved the following instructions: That if the jury should be-

lieve from the evidence stated in the preceding bills of exception in this cause, that there was a deed from Jonathan Scholfield and wife (said Scholfield being admitted to have been at the time seised of a legal estate in fee of the premises) to Robert I. Taylor, which deed conveyed the fee in the premises, for the use and occupation whereof this suit was brought, and if the jury should further believe that Taylor by a deed, subsequent thereto, and set out in the plaintiff's second bill of exceptions, conveyed the said premises to the plaintiff and his heirs, then, by the legal operation of the deed from Taylor to the plaintiff, there was such a possession transferred to the use thereby limited and conveyed, as dispensed with proof on the part of the plaintiff, that he had actual entry on, and possession of, the premises; and that the said deed gave to the plaintiff such a legal title thereto, and possession thereof, as could not be divested by a leasing of said premises to the defendant by Isaac Robbins, a stranger, so as to deprive the plaintiff of his remedy against the defendant, tenant of the premises, occupying and using them, though originally leased to him by said Robbins without the plaintiff's consent; which instruction the court refused to give, and the plaintiff excepted.

Although it has been deemed necessary to an accurate description and correct understanding of the points in the case, to state the several bills of exception in the record, yet it is obvious that the four bills sealed at the instance of the plaintiff, and making the second, third, fourth, and fifth in the order of the proceedings, may be embraced within the same view, as they all relate to the establishment of one and the same conclusion, viz., the necessity of establishing an agreement either express or implied by law, for the payment of rent by the defendant to the plaintiff.

In the argument of this cause, the counsel for the plaintiff has supposed himself called on to anticipate an objection to the remedy by action of *assumpsit*, for use and occupation of lands and houses, as not having existed in Virginia anterior to the cession of the District of Columbia to the federal government. Such an objection is regarded without just foundation, this remedy having been declared by the Supreme Court of Virginia to be always a part of the jurisprudence of that state, and having been likewise recognised in her legislation, not as a remedy created by statute, but as one enlarged and favoured, by making it a transitory in-

stead of a local action. Vid. Sutton *v.* Mandeville, 1 Munf. 407; Eppes *v.* Cole, 4 Hen. and Munf. 161; Sessions Acts, February, 1816, c. 15, s. 6; Tate's Dig. 465, s. 28.

But whenever the action of *assumpsit* for use and occupation has been allowed, it has been founded and would seem necessarily to be founded upon contract either express or implied. The very term *assumpsit* presupposes a contract. Whatever, then, excludes all idea of a contract, excludes, at the same time, a remedy which can spring from contract only, which affirms it, and seeks its enforcement. To maintain the action for use and occupation, therefore, there must be established the relation of landlord and tenant, a holding by the defendant under a knowledge of the plaintiff's title or claim, and under circumstances which amount to an acknowledgment of, or acquiescence in, such title or claim, and an agreement or permission on the part of the plaintiff. The action will not lie where the possession has been acquired and maintained under a different or adverse title, or where it was tortious and makes the holder a trespasser.

In Birch *v.* Wright, 1 T. R. 387, Buller, Justice, declares "that the action for use and occupation is founded in contract, and unless this be a contract express or implied, the action could not be maintained, as was held by Lord Mansfield in the case cited at the bar, of Carmur *v.* Mercer, which was tried about two years ago." The same principle is ruled in Smith *v.* Stewart, 6 Johns. 46. In the case of Henwood *v.* Cheeseman, 3 Serg. and Rawle, 500, it is said by the Supreme Court of Pennsylvania, "If the defendant occupied land by consent and permission of the plaintiff, the jury may presume a promise to pay a reasonable rent;" again, "the action for use and occupation is founded on privity of contract, not on privity of estate." In 2 Nott and McCord's Reports, 156, in the case of Ryan *v.* Marsh, the law is thus laid down: "It was argued that a contract might be implied, and certainly as long as the character of the act done by the defendant was doubtful, a contract might be implied; but when it is admitted that the possession was tortious, every characteristic of contract was excluded. No action for use and occupation will lie, when possession has been adverse and tortious, for such excludes the idea of a contract, which, in all cases of this action, must be express or implied."

Authorities upon this point might doubtless be multiplied. We will add two others to those already cited, viz. the cases of Stockett v. Watkins's administrators, 2 Harr. and Johns. 326; the opinion of the court on pp. 338, 339; and of Stoddert v. Newman, 7 Harr. and Johns. 251. The principles ruled in the authorities above referred to, appear to be strictly applicable to the case under consideration, and decisive of its fate. Upon an examination of the testimony, introduced by the plaintiffs, as set forth in his four bills of exception, it cannot fail to be perceived, that it imports throughout no proof of a contract between the plaintiff and defendant, of a holding by the latter under the former, of any acquiescence in, or knowledge of title in the plaintiff or of permission by him for the occupation of the defendant. So far from establishing these requisites for sustaining the plaintiff's demand, it excludes each and all of them. This evidence proves beyond dispute, a possession and holding by the defendant under an agreement with Robbins, as trustee of Swayne, an insolvent debtor; payment of rent to this trustee in pursuance of such agreement, until a claim was interposed on behalf of the United States, as creditors of the insolvent debtor; it further proves a failure or forbearance by the plaintiff to assert any interest or right to the subject, anterior to the year 1839, about the time of the institution of the plaintiff's action, and so far as a negative is capable of proof, a total ignorance on the part of the defendant of any right of the plaintiff, either to the rents or to the subject from which they were to issue. Upon the above view of the evidence as disclosed in the second, third, fourth, and fifth bills of exceptions, we hold the opinion of the Circuit Court to be correct; it is therefore affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Alexandria, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed, with costs.

CHARLES MCKNIGHT, APPELLANT, *v.* LAWRENCE B. TAYLOR, TRUSTEE, &c.

There must be conscience, good faith, and reasonable diligence, to call into action the powers of a court of equity.

In matters of account, where they are not barred by the act of limitations, courts of equity refuse to interfere, after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice, when the original transactions have become obscure by time, and the evidence may be lost.

THIS was an appeal from the equity side of the Circuit Court of the United States for the District of Columbia, holden in and for the county of Alexandria.

The facts in the case are fully stated in the opinion of the court, to which the reader is referred.

Semmes and *Jones*, for the appellant.

Lee and *Bradley*, for the appellee.

Semmes, for the appellant, contended that the decree of the court below was erroneous, and should be reversed for the following, among other reasons.

1. Because there is no equity in the bill or supplemental bill, and no case made for the interference of the court.

2. Because it decrees debts to be paid which the record shows has already been paid.

3. Because it decrees the debt mentioned in the schedule as that due to Thomas Janney and Co., to be paid to John Lloyd, who claims by virtue of various assignments named in said decree.

4. Because it did not allow the appellant, a lien on or *pro rata* dividend out of the trust fund for the debts paid off, and assigned for his use, as shown in the record.

5. Because the court should have presumed payment of the debts, in the absence of all evidence showing them still due, after the great lapse of time; or, if the court believed them still unpaid, they should have presumed an abandonment of the claims by the creditors from their laches and the lapse of time; and therefore erred in decreeing relief to claimants whose demands were stale, and who had knowingly slept upon their rights.

6. Because the court should, for like reason, have presumed a performance of the covenant contained in the deed of trust executed between the appellant and Robert I. Taylor, for payment of the schedule debts—a release of the same, or that it was abandoned or extinguished.

7. Because, if the said covenant was any part of the grounds or foundation of their decree, the court erred in decreeing upon it in favour of parties between whom and the covenantor there was no privity; or, if there was any such privity, then, because the covenant was a personal matter, disconnected from the trust, and upon which the remedy was by action at law; and more especially as there was no prayer in the bill for an enforcement of the covenant.

8. Because, if it was right under the circumstances to give any relief at all, the court should have decreed only the principal of the debts found due, and should, on account of the laches, have refused to allow any interest, on the principle on which the account of profits was denied in Acherly *v.* Roe, 5 Ves. 565; or, upon the principle of Pickering *v.* Lord Stamford, 2 Ves. jr. 272, 581, interest should have been allowed only from the filing of the bill; the plaintiffs having gone into equity for general relief, and not for an enforcement of the covenant in the deed, on which there was full remedy at law.

On the subject of the lapse of time, he cited 5 Leigh, 350; 6 Wheat. 481; 4 Johns. 1; 9 Peters, 416; 5 Leigh, 381; 7 Johns. 556; 2 Nott and McCord, 360; 9 Leigh, 393; 2 Baldwin, 477; Cowper, 109.

Bradley, for appellee.

As to lapse of time: there was a covenant between McKnight and Taylor, the consideration of which was the forbearance of creditors to sue, and they did forbear. 3 Swanston, 417. As to the presumption of payment: it is not well settled whether it is a matter of fact or law. Hughes *v.* Edwards, 9 Wheat.; same case in Cond. Rep. 654, 655; Elmendorf *v.* Taylor, 10 Wheat. 152; same case in Cond. Rep. 55, 56. See also, 10 Leigh, 284.

Jones, for appellant.

A decree must follow the equity of the bill, but the court below has not done it. Hellary *v.* Waller, 12 Vesey, settles the rule

that a court of equity will put itself in the position of a court and jury. The trustee, here, had full legal power to sell without coming to equity, and courts act on different principles when called upon to lend their aid, than when acting regularly. Ambler, 645. The creditors, generally, do not answer or take any notice, but appear to have abandoned the claim. Only one acts. This circumstance ought to be coupled with the staleness of the demand.

Mr. Chief Justice TANEY delivered the opinion of the court.

This is an appeal from the decree of the Circuit Court of the District of Columbia, for the county of Alexandria, sitting in chancery.

It appears from the record, that the appellant Charles McKnight, by deed bearing date the 29th day of September, 1813, conveyed to Robert I. Taylor, certain real property described in the deed, situate in the town of Alexandria, upon trust, to permit the appellant to occupy the same, and to receive the rents and profits without account, until a sale should become necessary, under the terms of the deed; and if he, the said Charles McKnight, should not on the 1st day of April, 1818, have paid the several creditors named in a schedule, annexed to the deed, the debts therein mentioned with interest, then the said Robert I. Taylor should, on notice of such default from any one of the said creditors or his representatives, proceed to sell the said property, or so much thereof as might be necessary, for cash at public auction, after giving three weeks notice of the time and place of sale, by advertisement in any paper published in Alexandria, and after defraying the reasonable expenses of sale, discharge the aforesaid debts with all interest due thereon.

The bill in this case was filed in August, 1837, by Robert I. Taylor, the trustee above mentioned, and after setting forth the deed of trust, proceeds to state that Thomas Janney and Co. (who are named as creditors in the schedule) had assigned the debt due to them, to Joseph Janney in trust for the payment of their creditors; and that Joseph Janney, under a provision in the deed of assignment, afterwards transferred the same to George Johnson, in trust for the same purpose; and that the complainant had been required by the said George Johnson, and by certain

other creditors named in the schedule, (but who are not named in the bill,) to sell the premises, so as aforesaid conveyed to him in execution of the trust; that the debts mentioned in the schedule were due from McKnight, the appellant, and John Stewart, who had been trading under the firm of McKnight and Stewart, and that no part of any of them had been paid. The bill further states that before the execution of this deed, the appellant had, on the 30th of April, 1808, conveyed a part of the same premises to a certain Jacob Hoffman, in order to secure Thomas Janney, against his responsibility as endorser on two notes discounted at the Bank of Alexandria and the Bank of Potomac; and that the said notes had been long before paid, although the property had not been re-conveyed to the appellant: that McKnight was giving out that the debts in the schedule had been all paid, and threatened to withhold possession if the trustee proceeded to sell under the deed, and that from these declarations of the appellant, and the outstanding legal title, the sale could not be made without injury to the interests of the parties concerned, without the aid of the Court of Chancery; and prays process against the heirs of Hoffman, (he being dead,) and against McKnight and Stewart, and all of the creditors named in the schedule; and, among the rest, against George Johnson, in order that they may be compelled to appear and answer the several matters charged in the bill. A supplemental bill was afterwards filed, in order to make additional parties, and for other purposes; but in the view which the court take of this subject it is unnecessary to state its contents. The creditors secured by the deed of trust are eleven in number, their respective claims varying in amount: the lowest being $85 72, and the highest $1227 19. The trustee, Robert I. Taylor, is himself one, and the debt due him stated to be $214 54.

To this bill Hugh Smith, one of the creditors, whose debt was $151, answered, saying merely that his claim is still due.

James Carson, another of the creditors whose claim was $85 72, answered and admitted that he had been paid.

The heirs of Hoffman also answered, and admitted that the notes intended to be secured by the conveyance to their father had been paid; and submit themselves to such decree as the court may deem just.

The answer of the appellant, so far as it is material to set forth

its contents, states that the claim of Thomas Janney and Co., which was $1022 69, was due upon open account, and that the respondent was entitled to a deduction of considerably more than $300 for money overpaid by mistake on the settlement of a former account, but that he cannot find a memorandum in writing to establish it, which he knows did once exist; and that after the execution of the deed of trust he transferred to Thomas Janney, on account of this debt, the note of a certain Jonathan Mandeville, for $467 08, due on the 20th of January, 1815, which, from what Janney himself afterwards told him, he believes to have been paid; and in respect to this item, his answer is responsive to the bill. He also specifies several creditors whose claims he states that he has paid, and among them the trustee, Robert I. Taylor, and he sets forth the manner in which he satisfied that debt. Some of the creditors mentioned in the schedule are not, however, named in his answer; and he mentions three whom he admits that he has not paid, and makes the same admission as to the small balance which would be due to Thomas Janney and Co., after deducting the credits claimed by him as above stated; but he does not admit that these debts are yet due, and insists that there is every reason to believe that they were paid by his former partner, Stewart, who was equally liable with himself; or, if not paid, that it was owing to the negligence and laches of the creditors in not proceeding against him; the respondent alleging that Stewart, after the dissolution of the partnership with him, removed to Martinsburg, in Virginia, about the year 1812, where he carried on a prosperous business until his death in 1825, and was fully able to pay these debts if the creditors had used proper diligence to recover them; and he relies upon the lapse of time as a good defence upon principles of equity against this proceeding.

There is a general replication to this answer; and it appears in evidence that upon the dissolution of the partnership of McKnight and Stewart, in 1812, a notice of it was published in the newspapers, stating that McKnight was authorized to collect the debts and settle the business of the concern. And a witness was also examined on the part of the complainant, who states, that from a perfect knowledge of the pecuniary situation of Stewart, from 1812, until his death, he knows that he was insolvent

when he removed from Alexandria to Martinsburg, and that he continued and died insolvent; that he had no property he could call his own, and out of which an old debt of $100 or $200 could have been made.

It also appears in evidence, that Thomas Janney and Co., on the 30th of April, 1823, assigned all their effects and claims to Joseph Janney, in trust to pay their debts. That by virtue of a provision contained in this deed of assignment, Joseph Janney afterwards, on the 10th of August, 1829, renounced the further execution of the trust, and transferred all the property and claims that remained in his hands to George Johnson, in trust for the same purposes for which they had been conveyed to him. And on the 14th of November, 1837, after this bill was filed, Johnson sold and assigned all the effects and claims which he then held as trustee of Thomas Janney and Co., to John Lloyd, of Alexandria; and on the same day executed a power of attorney in his favour, authorizing him to receive whatever might be recovered in this suit, or on any other claims of Thomas Janney and Co., and to compromise and settle them in any manner he might think proper. The consideration paid by Lloyd is not stated, nor indeed does it appear by the assignment, that any consideration whatever was paid. The deed of assignment merely states that Johnson had sold these effects and claims to Lloyd, and authorizes him to collect, compromise, and settle them.

The bill was taken *pro confesso* against all of the creditors who had not appeared and answered, and the Circuit Court proceeded on final hearing to decree that the appellant should pay the full amount of the debts mentioned in the schedule, with interest, by a certain day specified in the decree, except those of Joseph Janney, John Leo, and James Carson, which were admitted to have been paid; and in default of payment by the day limited in the decree, the property was directed to be sold and the proceeds applied to discharge the aforesaid debts.

This is the case in its material parts, as presented in the record. The omission of the creditors to appear and answer, upon which the bill as against them was taken *pro confesso*, was not, of course, regarded by the Circuit Court as establishing their claims. The decree, we presume, proceeded upon the ground that the creditors mentioned in the schedule were entitled to the aid of the court

to enforce the payment of the whole amount originally admitted to be due, unless the appellant could show by legal proofs that the debt had been since discharged.

Now, of the eight creditors in whose favour the decree was made, five of them seem to have taken no concern in these proceedings, and for aught that appears in the record, may not have known that it was pending; certainly there is nothing to show that they ask or desire the interposition of the court in the manner sought for by the bill. Of the remaining three, one has answered and stated that his claim is still due, but does not ask for a sale, nor say any thing that sanctions, on his part, the proceedings of the trustee; and the trustee himself does not ground the bill upon his own claim, nor allege its nonpayment as the foundation of the suit, but places it entirely upon the notice and request of George Johnson and other creditors, and his own duty upon such an application to proceed to sell according to the provisions in the deed of trust. But, although the application is alleged to be made by other creditors, as well as George Johnson, yet no other creditor has appeared to claim the execution of the trust; and, as they were all made defendants and called to answer, and have refused or neglected to appear, the bill under the provisions of the deed must be regarded as founded exclusively upon the application of the creditor named in it; and as instituted and conducted without the co-operation or request of any other creditor.

In relation to this claim, it appears that nineteen years and three months were suffered to elapse, before any application was made for the execution of the trust by which it had been secured. No reason is assigned for this delay; nor is it alleged to have been occasioned in any degree by obstacles thrown in the way by the appellant. As the record stands, it would seem to have been the result of mere negligence and laches. The original creditors were in business ten years after the deed was made, and five years after the expiration of the credit which it gave to McKnight and Stewart. And as they became insolvent in 1823, it must be presumed that in the last-mentioned period they were themselves pressed for money. The property is situated in the town of Alexandria, where the laws of Virginia have been adopted by Congress; and the trustee, under these laws, had an undoubted right to sell, upon the application of any creditor, as soon

as default was made, without asking the interposition of the Court of Chancery. Such delay, under such circumstances, by the original creditors, followed by fourteen years more by the assignees who afterwards had charge of this claim, can perhaps hardly be accounted for without supposing that this debt had been nearly, if not altogether, satisfied in the manner suggested in the answer of the appellant. If, indeed, the suit had been postponed a few months longer, twenty years would have expired, and in that case, according to the whole current of authorities, the debts in the schedule would all have been presumed to be paid. But we do not found our judgment upon the presumption of payment. For it is not merely on the presumption of payment, or in analogy to the statute of limitations, that a court of chancery refuses to lend its aid to stale demands. There must be conscience, good faith, and reasonable diligence, to call into action the powers of the court. In matters of account, where they are not barred by the act of limitations, courts of equity refuse to interfere after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice when the original transactions have become obscure by time, and the evidence may be lost. The rule upon this subject must be considered as settled by the decision of this court in the case of Piatt *v.* Vattier, 9 Peters, 416; and that nothing can call a court of chancery into activity but conscience, good faith, and reasonable diligence; and where these are wanting, the court is passive and does nothing; and therefore, from the beginning of equity jurisdiction, there was always a limitation of suit in that court.

It certainly cannot be said that there has been any thing like reasonable diligence by any of the creditors in the case before us; and at this distance of time, when many of the parties originally concerned are dead, we should hardly do justice between them if we required the appellant to pay the whole amount stated in the schedule, unless he can establish the credits he claims by legal proofs. In fact, but one of the creditors appears to have called for this proceeding, or to have sanctioned the institution of this suit; and the party who now holds that claim and seeks to enforce it, has obviously no equitable ground upon which he can ask for a relaxation of the rule in his favour. When the assignment was made to him he knew it was a disputed claim in actual

litigation at the time, which had been allowed to sleep for almost twenty years, and for which it does not even appear that he paid any valuable consideration. And as to all of the creditors named in the schedule, they had originally an easy and simple remedy in their own hands, to be used or not at their own pleasure; and if they have suffered it to be lost by the lapse of time, their own negligence can give them no right to call into action the powers of the Court of Chancery.

The decree of the Circuit Court must therefore be reversed, and the bill dismissed with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Alexandria, and was argued by counsel. On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court in this cause be and the same is hereby reversed, with costs; and that this cause be and the same is hereby remanded to the said Circuit Court, with directions to dismiss the bill of the complainant with costs.

JAMES C. BELL AND ROBERT GRANT, PLAINTIFFS IN ERROR, *v.* MATTHIAS BRUEN.

A letter of guarantee, written in the United States, and addressed to a house in England, must be construed according to the laws of that country.

Extrinsic evidence may be used to ascertain the true import of such an agreement, and its construction is matter of law for the court.

In bonds, with conditions for the performance of duties, preceded by recitals, the undertaking, although general in its terms, is limited by the recital.

Commercial letters are not to be construed upon the same principles as bonds, but ought to receive a fair and reasonable interpretation according to the true import of the terms; to what is fairly to be presumed to have been the understanding of the parties; and the presumption is to be ascertained from the facts and circumstances accompanying the entire transaction.

The court will not express an opinion upon a matter of defence which was not brought to the consideration of the court below.

This case was brought up by writ of error, from the Circuit Court for the district of New York.

The plaintiffs in this court, who were also plaintiffs below, were merchants and partners, trading under the name and firm of Bell and Grant, and resided in London. The action was brought to recover the value of five several sets of bills of exchange, amounting respectively to £385, £318 12*s.* 6*d.*, £1500, £140, and £3500, which, it was alleged, were guarantied by the defendant.

At the trial of the case in the Circuit Court, the defendant pleaded *non-assumpsit* and the statute of limitations; but the questions arising under the latter plea were not argued, as the opinion of the court, upon the guarantee, was against the plaintiffs.

The facts of the case, according to the evidence, were as follow:

Prior to the year 1830, George W. and H. Bruen, two sons of the defendant, had been carrying on commercial business under the partnership name of G. W. and H. Bruen, in the city of New York. In that year they failed, and William H. Thorn succeeded to the business of the house; George W. Bruen, one of the former partners, being interested in the business of the said Thorn.

In the year 1831, George W. Bruen also transacted business at New York, in the name of his father, the defendant. There was no regular, established house in the name of the defendant, although subsequently adventures were conducted in his name. This agency was carried on under two very extensive powers of attorney, which were duly recorded, in New York, throughout the years 1831–2–3–4, and part of 1835, when the defendant was preparing to go to Europe, and the powers of attorney were revoked.

Early in the year 1831, Thorn had credits furnished to him by Bell and Grant, upon houses in Trieste, Messina, Leghorn, and Marseilles. On the 23d February, 1831, he wrote to Bell and Grant, and among other things said, "My friends in Marseilles might secure many consignments for me, if I could put them in a situation to make the necessary advances, and I therefore hope you will oblige me by opening the credit I ask for, and, if you require it, Mr. M. Bruen will give you his guarantee. I enclose a letter for Messrs. Archias and Co., which you will forward to

them, should you think proper to open the credit; otherwise, I do not wish you to send it, as it relates entirely to this credit, and the manner in which the advances are to be made; it is understood, that no more than £2000 are to be drawn for at any one time, and that the credit is then to be considered at an end, until your advances are covered by remittances from me, when you will again renew it."

On the 22d of March, 1831, Bell and Grant acknowledged the receipt of the above, by a letter from which the following is an extract: "We have received, since the above, your letter of the 23d ult., with an enclosure for Messrs. Archias and Co., of Marseilles, which we forward to them to-day, with a confirmation of the credit you give them upon us to the amount of £2000, for the purpose of making advances on consignments, and which we will accordingly thank you to have guarantied to us, as you propose, by Mr. Matthias Bruen."

On the 23d April, 1831, Mr. Matthias Bruen, the defendant, wrote the following letter to Bell and Grant:

"*New York, 23d April*, 1831.

"DEAR SIR,—Our mutual friend, Mr. Wm. H. Thorn, has informed me, that he has a credit for £2000, given by you in his favour with Messrs. Archias and Co., to give facilities to his business at Marseilles. In expressing my obligations to you for the continuation of your friendship to this gentleman, I take occasion to state, that you may consider this, as well as any and every other credit you may open in his favour, as being under my guarantee."

On the same day, the 23d of April, Thorn wrote to Bell and Grant a letter, from which the following is an extract: "Enclosed you will find Mr. M. Bruen's guarantee, and as you are now fully secured in any credit you may open for me, I hope you will consider on the propriety of allowing me to make insurance here on any goods that may be shipped for my account."

On the 14th June, 1831, Bell and Grant acknowledged the receipt of Bruen's letter as follows:

"MATTHIAS BRUEN, ESQ., *New York*.—We are in receipt of your favour of the 23d April, guarantying the credit opened on behalf of Mr. W. H. Thorn, with Messrs. Archias and Co., of Marseilles, for £2000, for the purpose of facilitating his business

with that place, and moreover, desiring us to consider, as under your guarantee, also, all credits existing, or that we may hereafter open for said friend, of which we take due note. And we trust that Mr. Thorn, as well as your good self, will have every reason to be satisfied with the confidence which we feel a pleasure in assigning to both of you."

It was given in evidence that from 1831 to 1837, Thorn, by means of the credits opened for him at various places, received consignments from those places, upon which advances had been made, and sent remittances, from time to time, to Bell and Grant, in London.

On the 3d of March, 1834, Thorn wrote to Bell and Grant as follows: "I have informed Messrs. R. Anderson and Co. and Messrs. Archias and Co. that the times are such as to render consignments no longer desirable, which I hope will reach them in time to prevent any further draft on you."

On the 7th of March, 1834, Bell and Grant wrote to Thorn, "We beg your reference to the foregoing copy of our letter of yesterday, and have only at present to add thereto an extract of what we write to-day, (while communicating with them on other business,) to Messrs. Archias and Co., of Marseilles, recommending their refraining from pressing shipments to you on consignment, until the state of commercial matters in the United States shall make business more acceptable, than, under the recent circumstances, we may presume it would be to you.

"We trust that the next accounts from your side will be less gloomy, and may enable us, as we shall most readily do in such case, to place business for you on its former footing."

On the 24th April, 1834, Thorn wrote to Bell and Grant: "I have read what you have been pleased to write to Messrs. Archias & Co. on the subject of consignments under advances, which meets my warmest approbation, as you will have seen by my letter of March 3d."

On the 21st of October, 1834, Bell and Grant wrote to Thorn: "Messrs. Archias & Co., of Marseilles, having inquired of us, under date 9th inst., whether you had opened a credit in their favour upon us, to make advances on shipments to your address, as you had mentioned to them as your intention of doing, and adding that they did so in consequence of the prospect they then

had of influencing a consignment to you; we told them, by return of post, that, although we should be ready at any time to confirm any such arrangement, and were yet without your authority to that effect, they might consider themselves at liberty to value upon us for your account to the extent of £2000 sterling, on handing us the customary shipping documents, (as we would have been sorry to see such business pass your door for want of the facilities in question,) expressing a hope at the same time that they would only grant such advances on property, the sale of which, they felt assured by their latest advices, would be of ready sale in the New York market; all of which we trust will meet your entire approbation. We should have extended the credit in question to the former sum of £3000, but that for the present we conceived you would be better pleased with the lesser amount; you have, however, only to let us know your wishes in this respect to insure our conformity thereto."

On the 31st October, 1834, Thorn wrote to Bell and Grant: "I have to request that you will open the following credits for my account: To Messrs. R. Anderson and Co., Gibraltar, for the purpose of making advances, per my account, £4000, to Messrs. Archias and Co. for the same purpose, £4000; to Messrs. Francia, Brothers and Co., of Gibraltar, £2500."

On the 3d of December, 1834, Bell and Grant wrote to Thorn: "We have now the pleasure of acknowledging the receipt of your much esteemed favour of the 31st October, in compliance with which we have immediately increased the credits already opened for your account with Messrs. Robert Anderson and Co., of Gibraltar, and Messrs. Archias and Co., of Marseilles, to the sum of £4000 each, and opened fresh ones of £2500, say two thousand five hundred pounds in favour of Messrs. Francia, Brothers and Co., of Gibraltar, to enable them to grant advances on consignments to you from thence and from Malaga.

"And it is moreover understood, that so soon as the credits in favour of the three first-named houses have been used and remitted for by you, we are to re-open the same accordingly, which shall be attended to."

One of the bills upon which the suit was brought, was drawn under the above credit by R. Anderson and Co. upon the plaintiffs,

dated on the 16th December, 1836, for £318 12*s.* 6*d.*, at ninety days after date, which bill was paid by the plaintiffs.

On the 31st of March, 1836, Thorn wrote to Bell and Grant: "I have sold a large parcel of San Lucas wine, consigned to me by Messrs. La Cave and Echicopar, per Lurin, which may lead to further shipments; and as they will require a credit opened to enable them to make advances, you will please authorize them to draw on you, on the usual conditions, to the extent of £2500, say two thousand five hundred pounds."

Another of the bills upon which the suit was brought, was drawn under this credit by La Cave and Echicopar upon the plaintiffs, dated on the 22d November 1836, for £385 sterling, which was paid by the plaintiffs at maturity.

On the 15th of August, 1836, Thorn wrote to Bell and Grant: "I intend to send a vessel to Smyrna for an assorted cargo, and will thank you to open a credit to Messrs. G. Amac, Zipcey and Co., to that place, to the extent of £3500."

Two other of the bills upon which the suit was brought, were drawn upon the credit thus opened, by Amac, Zipcey and Co. upon the plaintiffs, dated on the 7th of January, 1837, one for £1590, and the other for £140, which were paid at maturity.

In November, 1836, the defendant went to Europe, and did not return until the following August. During his absence he was in London, where he saw the plaintiffs several times.

On the 16th of February, 1837, G. F. Darby, the agent of the plaintiffs residing in New York, drew bills of exchange upon them to the amount of £4000 sterling, which bills he loaned to Thorn, upon collateral security and the guarantee of G. W. Bruen.

On the 8th of March, 1837, Thorn wrote to Bell and Grant: "As this remittance will very nearly balance my old account, I have prevailed on Mr. Darby to open me a credit similar to the last, and on the same conditions, for £3500, which shall be punctually provided for on the 8th May next, if not sooner."

On the same day, four of the bills upon which the suit was brought were drawn upon the credit thus opened, which amounted, in the whole, to £3500, and were accepted and paid when due by the plaintiffs. These bills were guarantied by George W. Bruen, the same person who had guarantied the loaned bills for

£4000, and who, at this time, was in good credit, and could have raised £4000 on his notes.

On the 10th of April, 1837, Thorn failed and was insolvent, and the means of his house exhausted.

On the 26th of November, 1839, Grant, then in New York, wrote to the defendant, applying to him for the balance due to his London firm, and saying, "Any further explanation you may require I am ready to give, but I must request your attention in the mean while to the above claim, which I make under your letter of guarantee to Bell and Grant, for any credits they might open in favour of Mr. Thorn, and of which letter I sent you a copy, at your request, last February twelve-month."

In the trial of the cause in the court below, the plaintiffs proved by the evidence of one Schenck, that he was for many years the cashier of Bell and Grant, and greatly in their confidence; that he was well acquainted with their daily mercantile operations; that, as well from his perusal, at the time, of the letters which were received and written by them on the subject of their account and transactions with Thorn, as also from various conversations which he had with them, and the directions which he received with regard to the bills, he had no doubt whatever but that the credits given to the various houses who drew the bills, were given by Bell and Grant in full reliance on the letter of guarantee which had been written to them by the defendant.

The evidence being closed in the court below, the counsel of the defendant prayed the court to instruct the jury, among other things, as matter of law, that the letter of guarantee, of April 23, 1831, was void, as not expressing a consideration; that the said letter of guarantee was confined to credits to be opened to the house of Archias and Co., or other houses with whom Thorn might deal at Marseilles, and therefore could not cover the advances upon the bills of exchange given in evidence. And thereupon the judges did declare their opinion and decide, as matter of law, that by the true construction of the said letter of guarantee, of April 23, 1831, the same only embraced credits which should be opened for account of William H. Thorn to the house of Archias and Co., of Marseilles, and that the evidence

of the other matters in that behalf proved, did not give the said letter of guarantee a more enlarged application; and, therefore, that the jury ought to find a verdict for the defendant.

To this instruction the plaintiffs' counsel excepted.

Lord and *Sergeant*, for the plaintiffs in error.

Choate, for the appellees.

Lord, for the plaintiffs, said that the consideration was sufficient, as the defendant's son was a partner in the house whose prosperity was to be increased. 9 Cranch, 348; 6 Binney, 201; 15 Peters, 314.

In the guarantee there is no limitation of time or amount, as to the credit with Archias and Co. Why limit it to others and not to them? The defendant relied upon his supervision over the house, and his being able to revoke the credit whenever he might apprehend danger.

Such guarantees are not the subject of technical criticism; they are not the work of lawyers, but merchants in the course of business, and are not to be judged by the strict rules of the common law. Being of a continuing character, they involve the highest expression of confidence.

The doctrine of construction never arises until some ambiguity exists. Bruen, the son, had the entire confidence of his father, as the powers of attorney show. If the words, "any and every, &c." do not mean what we say, they mean nothing. "Any" means "some"— every" takes in all, and what does "other" mean? 3 Camp. 22L

What was the construction that Bell and Grant placed upon it? Their letter shows, and if defendant thought it was not the correct one, he ought so to have informed them.

As to the legal construction, 12 East, 227, says, words must be taken as strongly against the party giving the guarantee as the case will admit. See also, 2 Meriv. 280; 6 Binn. 244; 12 Wheat. 517; 7 Peters, 113; 10 Peters, 492; 16 Peters, 528, 536; 12 East, 237; 2 Campb. 413; 1 Metcalf, 225; 12 East, 227; 6 Bingh. 244; 6 Meeson and Wilsby, (Exchequer,) 605; 3 Campb. 220; 2 Campb. 39.

The court erred in determining the question, absolutely, as a

question of law, and declaring that the other circumstances did not allow of an extended view of the guarantee. If these circumstances were admitted, their effect was for the jury.

Choate, for defendant, made the following points:

1. That the defendant's letter of April 21, 1831, was a contract, preceded by a recital, and that the engagement extends no further than the recital.

2. The recital introduces in direct terms, or by reference, the entire arrangement made between plaintiffs and Thorn, by the letters of the 23d of February, 1831, and March 22, 1831; and the words "this credit," in the defendant's letter of 23d April, 1831, mean the first £2000; and the words "and any and every other credit," mean the subsequent credits, to be opened under the same arrangement.

3. The court will adopt the construction which, under all the circumstances of the case, ascribes the most reasonable, probable, and natural conduct to the parties, and this requires the adoption of the defendant's construction.

4. The plaintiffs never relied upon this guarantee for the credits, the subject of this suit.

5. They gave no such notice to the defendant, of the opening of the credits, which are the subject of this suit, as is required to charge the defendant.

6. They did not, within a reasonable time after the grant of the credits, and after the bills were paid, demand payment of the defendant, or give him notice that they looked to him.

7. The original arrangement made between the plaintiffs and Thorn, in March, 1831, was subsequently, in the spring of 1834, abandoned and deserted; and in the autumn following, a new and inconsistent one, enlarging the credits to be given, and diminishing the security, was made, rendering notice to the defendant necessary, but to which no notice could have given legal effect to charge the defendant for subsequent credits.

8. The apparent diversity of terms between the recital and the engagement in the defendant's letter, raises a doubt upon the face of the guarantee as to its true extent; and upon that doubt, thus raised, the construction will be in favour of the surety.

Mr. Choate then discussed the two constructions to be placed upon the letter. There is no proof that Bruen, the son, was a partner in the house. Record only says, "interested and conversant." He might have had a contingent salary. If he was a partner, there is no proof that defendant knew it.

In March, 1834, the arrangement was abandoned, and in the following October, the plaintiffs and Thorn made a new one.

In October, 1836 and 1837, plaintiffs made another arrangement with Thorn, opening credits for $50,000. In April, 1837, Thorn failed, and in June, 1837, Bell became embarrassed; and yet the defendant was not notified until 1839.

As to the letter of 23d April, its language must be limited by the recital and the circumstances. Sheph. 86. Courts habitually so limit instruments. 1 Domat, 248; 3 Ch. Cases, 101; Sheph. 76; Bac. Abr. title "Fait;" 9 Mass. Rep. 235; Theobald on Surety, 66; 1 Law Lib. 39.

Condition, when larger than the recital, is limited by it. Fell on Guarantees, 116; 1 Williams's Saunders, 415, note; Aleyn, 10; 1 Strange, 227; 2 Saunders, 412, a leading case; 6 East, 507; 2 Smith, 655; 2 New Rep. 175, referred to in Fell, 125; 2 Barn. and Ald. 431; 2 Maule and Sel. 363; 4 Taunt. 593.

Reason of the rule is, that it is supposed to reach the true meaning of the parties, as it is more likely that men will use language improperly than act foolishly. Hobart, 304; Sheph. Touch. 86.

So in the civil law; the court looks to probability. 1 Domat, 248. So in 16 Peters, 534, reference is had to the circumstances of the case. 12 Wheat. 518; 2 Pick. 235; 17 Wend. Rep. 425; 1 Metcalf, 25; 8 Taunt. Rep. 208.

Reason is stronger in the case of a surety. He is a favourite of courts, and his contract is *stricti juris*. Where the terms are clear, they are not to be extended; where they are doubtful, the court will adopt the narrower sense, provided it be reasonable and probable. Pothier on Oblig. p. 2, c. 6, s. 4; Code Napoleon, tit. 14, c. 1, arts. 2011, 2015, p. 401; 7 Cranch, 90, never repealed; 7 Peters, 122, does not conflict with it, but adopts it. 1 Mason, 336, that the language should be strong to make a continuing guarantee; in case of doubt, construction in favour of surety; 16 Peters, 537; Ludlow *v.* Simonds, 2 Caines's Cases in

Error, 1; 10 Johns. Rep. 311, 325; 8 Wend. 516; 17 Wend. 422; 2 Pick. 224.

The law in England is so now. In the cases cited on the other side, there is a plain meaning against the surety. 1 Starkie, 192; 8 Taunt. 224; 3 Barn. and Ald. 594, 595; Nicholson and Paget, 52; 6 Mearn, (Exchequer Reports,) 613; 1 T. R. 287; 2 T. R. 370; 3 East, 484; 8 Moore, 588, 582; 1 Perry and Davidson, 249; 10 Ad. and Ellis, 30.

This letter is a contract preceded by a recital of the circumstances. A recital is a prefatory statement to make the meaning plain. The purpose of the credit is stated, and the writer must have referred to the renewed credit. 2 Bos. and Pul. 238. There is only one case carrying the engagement beyond the recital, and that is 2 Campbell, N. P. Rep. 39. But that was different from the present case, the engagement there being for any thing "due on any other account," and inconsistent with the recital; but here it is not. No one asked defendant for an unlimited guarantee. Conduct of plaintiffs not likely to excite suspicion, because they merely echoed defendant's own letter.

The plaintiffs ought to have notified defendant when they opened new credits. 5 Peters, 624; 12 Peters, 213; 4 Greenl. 525; 22 Pick. R., 223; 17 Johns. 140. Notice of default, at all events, is indispensable. 14 Pick. 353; 18 Pick. 536; 8 Pick. 423; 22 Pick. 223; 3 Wheat. 144; 9 Serg. and Rawle, 202.

The court below was right in deciding the question as a point of law. 1 Peters, 182; 5 Cranch, 190; Paine's C. C. R. 545; 20 Pick. 156.

Sergeant, for plaintiffs, in reply, said that he had not had time, since yesterday, to look at all the authorities cited on both sides, there being about one hundred and fifty. This court have settled the law, in 13 Peters, 89, as to the exclusion or admission of parol evidence of circumstances. In Moran *v.* Bullitt, 16 Peters, they decided that when there is a valuable consideration, an endorser, though often a mere surety, is governed by the law merchant, and not the common-law rules as to sureties.

1. The written guarantee by itself.
2. As explained by evidence.

1. By itself. Every letter is written to some one; but does

not bind until accepted by the other party. Then the two letters constitute one contract. If the acceptance varies from the offer, the offering party ought to say so. It is a law of correspondence to speak the truth plainly; and hence, if there be ambiguity, the construction must be against the writer. It may be an intentional trap. The case in 16 Peters turned upon this. Bell and Grant answered the letter, saying what they thought of it; but the charge of the court below was given upon only one of these two letters.

In 2 Campbell, 39, the recital in a bond did not limit the engagement, because it was a commercial transaction. In 1831, Bruen came forward voluntarily. Bell did not ask him nor inquire his motives. A guarantee always implies that the thing would not be done without it. If Bruen intended what we say, he would have used the very words he did. There is no ambiguity, and why construe it in? All the cases except that in Campbell were bonds with collateral conditions. Lord Ellenborough treats them all as bonds given in appointments to office. These are common law instruments, and the recital is put in on purpose to explain. But not so with commercial contracts. There is no recital in a letter or conversation. In the bond cases there is a contradiction, but there is none here.

The jury could have inferred Bruen the son's partnership in Thorn's house. He was interested in "the business." What business? Bruen, from bankruptcy, had become worth £4000 in seven years. The defendant therefore wished to sustain his son.

The question of notice ought to have gone to the jury. Douglas *v.* Reynolds, 7 Peters, is decisive that notice is a question of fact.

Thorn failed on 10th April, 1837; this dispenses with notice of the default: 12 Peters, 213.

Mr. Justice CATRON delivered the opinion of the court.

The original action was founded upon a guarantee given by Matthias Bruen to Bell and Grant, in favour of Wm. H. Thorn, by the following letter:

New York, 23d April, 1831.

MESSRS. BELL AND GRANT, *London*.—DEAR SIRS:—Our mutual friend, Mr. Wm. H. Thorn, has informed me that he has a credit for £2000, given by you in his favour with Messrs. Archias

and Co., to give facilities to his business at Marseilles. In expressing my obligations to you for the continuation of your friendship to this gentleman, I take occasion to state, that you may consider this, as well as any and every other credit you may open in his favour, as being under my guarantee.

I am, dear sirs, your friend and servant, M. BRUEN.

To this letter the following answer was given by Bell and Grant:

London, 14*th June*, 1831.

MATTHIAS BRUEN, Esq., *New York*.—We are in the receipt of your favour of the 23d April, guarantying the credit opened on behalf of Mr. Wm. H. Thorn with Messrs. Archias and Co., of Marseilles, for £2000, for the purpose of facilitating his business with that place; and, moreover, desiring us to consider as under your guarantee, also, all credits existing, or that we may hereafter open for said friend, of which we take due note. And we trust, that Mr. Thorn, as well as your good self, will have every reason to be satisfied with the confidence which we feel a pleasure in assigning to both of you."

The declaration contains four counts:

1. That the plaintiffs, on the 31st of March, 1836, were requested by Thorn to open a credit in his favour, authorizing the firm of La Cave and Echicopar, of Cadiz, to draw on the plaintiffs to the extent of £2500. That on the 22d November, 1836, La C. and E. drew for £385: which was advanced on the 12th February, 1837, by the plaintiffs, according to Thorn's request.

2. That on the 10th of October, 1834, at the request of Thorn a credit was opened in his favour, authorizing R. Anderson and Co., of Gibraltar, to draw for £4000. On the 16th December, 1834, Anderson and Co. drew for £318 12*s.* 6*d.*: which plaintiffs paid, 19th March, 1837.

3. That on the 15th of August, 1836, the plaintiffs opened a credit in favour of Thorn, authorizing Amac, Zipcey and Co., of Smyrna, to draw for £3500. Of this sum, the house at Smyrna drew £1640: which plaintiffs paid, 8th April, 1837.

4. That on the 8th March, 1837, plaintiffs opened a credit to Thorn, himself, for £3500, for which amount he drew bills; and which were paid, 17th June, 1837.

Much other correspondence and evidence was given to the

jury, that need not at present be referred to; but which appears in the statement of the case made out by the reporter, and presented to us.

The evidence being closed, the defendant prayed the Circuit Court to instruct the jury, as matter of law, that the letter of guarantee, of April 23d, 1831, was confined to credits to be opened to the house of Archias and Co., or other houses with whom Thorn might deal at Marseilles; and therefore the plaintiffs could not recover from the defendant, the advances made upon the bills of exchange given in evidence: being for the sums paid, as stated in the four counts of the declaration.

Thereupon the court did decide, as matter of law, "that by the true construction of the said letter of guarantee, of April 23d, 1831, the same only embraced credits which should be opened for account of Wm. H. Thorn to the house of Archias and Co., of Marseilles; and that the evidence of the other matters in this behalf proved, did not give the said letter of guarantee a more enlarged application. And therefore, that the jury ought to find a verdict for the defendant."

The jury found accordingly: and it is this instruction of the court alone, that we are called upon to examine, and revise. Does the letter of guarantee extend to, and cover the debts of Wm. H. Thorn sued for? is the question. It was an engagement to be executed in England, and must be construed and have effect, according to the laws of that country. Bank of the United States *v.* Daniel, 12 Peters, 54, 55. But it is necessary to remark that the law governing the agreement is the same in this country and in England: had it been made between merchants of different states of this Union, and intended to be executed at home, the same rules of construction would be adopted; and the same adjudications would apply.

It is insisted for the plaintiffs, that the Circuit Court erred in determining the question absolutely as a question of law, upon the construction of the letter: that it also erred in declaring the other circumstances did not allow of an application of the guarantee to the transactions in question: such other circumstances, being admitted, their effect on the extent and application of the guarantee was for the jury; and by deciding on their effect as matter of law, they were withdrawn from the jury.

The letter of Bruen was an agreement to pay the debt of another on his making default: by the statute of frauds, (29 Chs. 2,) such agreement must be in writing, and signed by the party to be charged: it cannot be added to, by verbal evidence; nor by written either, if not signed by the guarantor, unless the written evidence is, by a reference in the letter, adopted as part of it.

But as the statute does not prescribe the form of a binding agreement, it is sufficient that the natural parts of it appear either expressed, or clearly to be implied: and correspondence and other evidence may be used to ascertain the true import and application of the agreement; by the aid of which extrinsic evidence, the proper construction may be made. Such is the doctrine of this court, as will be seen by reference to the cases of Drummond *v.* Prestman, 12 Wheat.; Douglass *v.* Reynolds, 7 Peters; Lee *v.* Dick, 10 Peters.

In the present instance, the question having arisen, and construction been called for, the matters referred to in the letter of the defendant, were considered; (as circumstances attending the transaction,) to aid the court in arriving at a proper understanding of the engagement: so soon as it was understood, its construction belonged to the court, and was, "matter of law," within the general rule applicable to all written instruments. It rested with the court to decide, whether the guarantee extended to, and covered the credits set forth in the declaration: and was the common case of asking the court to instruct the jury, that the plaintiff had not proved enough to entitle him to recover, admitting all his evidence to be true. In England, the same end is attained, by moving for a nonsuit.

For the defendant it is contended: That the letter of April 21, 1831, is a contract, preceded by a recital, and that the engagement extends no further than the recital.

The recital introduces in direct terms, or by reference, the entire arrangement made between plaintiffs and Thorn, by the letters of the 23d of February, 1831, and March 22, 1831; and the words "this credit," in the defendant's letter of 23d April, 1831, mean the first £2000; and the words "and any and every other credit," mean the subsequent credits, to be opened under the same arrangement.

The general rule is well settled in controversies arising on the

construction of bonds, with conditions for the performance of duties, preceded by recitals; that where the undertaking is general, it shall be restrained, and its obligatory force limited within the recitals. The leading case, is Arlington *v.* Merricke, 2 Saund. R. 403. It has been followed by many others: Liverpool Waterwork Co. *v.* Harpley, (6 East, 507;) Wardens, &c. *v.* Bostock, (2 Bos. and P. 175;) Leadley *v.* Evans, (2 Bingh. R. 32;) Pepin *v.* Cooper, (2 Barn. and A. 431,) are some of the principal cases affirming the rule.

Where a mercantile guarantee, is preceded by a recital, definite in its terms; and to which the general words obviously refer, the same rule applies, of limiting the liability, within the terms of the recital, in restraint of the general words. We find the courts constantly referring to the cases arising on bonds with conditions, for the rule of construction, and applying it to commercial guarantees; the most approved text writers on this subject do the same: does the engagement before us fall within the rule? It recites:

"Our mutual friend, William H. Thorn, has informed me that he has a credit for two thousand pounds, given by you in his favour with Messrs. Archias and Co., to give facilities to his business at Marseilles." The agreement is: "I take occasion to state, that you may consider this, as well as any and every other credit you may open in his favour, as being under my guarantee."

We are of opinion that the engagement should be construed as if it read—"You may consider *this*, credit with Archias and Co., as being under my guarantee: as well as, any and every other credit, you may open in favour of William H. Thorn with any and every other person, as also being under my guarantee." And that therefore the first branch of the undertaking has reference to the recital; and that the latter part, is independent of it. To hold otherwise, would reject the general words—"as well as any and every other credit"—as unmeaning and useless: the agreement having the same effect, by the construction claimed for the defendant, if these words were struck out, as if they are left in it.

The general words, it is insisted, related to the character of the credit opened with Archias and Co., because it was an open and continuing credit, for £2000. That this appears by the letters

of Thorn to Bell and Grant, and to Archias and Co.; which are sufficiently referred to in the recital of the letter to make them part thereof, and to extend it to the continuing credit with Archias and Co.

That the two letters of Thorn were sufficiently referred to, and could be read to establish the nature of the credit; and that it was open, we have no doubt; but their adoption was just as certain without the general words, as with them. The special reference to the recital, adopting it as explained by the letters, leaves the general words still without meaning unless the guarantee extends beyond the credit opened with Archias and Co.

To make a proper application of the general words, it becomes necessary to lay down a definite rule of construction applicable to them; as the authorities are in conflict, and to say the least, in considerable confusion, on the subject. The arguments are in direct conflict.

For the plaintiffs in error, (Bell and Grant,) it is contended: "That the guarantee by letters is to be taken, in case of doubt, or ambiguity, on its face or otherwise, in the broadest sense, which its language allows, and in which it has been acted on by the parties." Drummond *v.* Prestman, (12 Wheat.;) Douglass *v.* Reynolds, (7 Peters;) Dick *v.* Lee, (10 Peters;) Mauran *v.* Bullus, (16 Peters;) Mason *v.* Pritchard, (12 East;) Merle *v.* Wells, (2 Campb. R. 413;) Bent *v.* Hartshorne, (1 Metcalfe R.;) Hargreave *v.* Smee, (6 Bingh. R.; 10 Eng. Com. Law Rep. 69;) Mayer *v.* Isaac, (6 Mees. and Wels. Exch. R.;) and Bastow *v.* Bennet, (3 Campb. R.) are relied on, to support the construction claimed as the true one.

On part of the defendant, (Bruen,) it is insisted, "That the apparent diversity of terms, between the recital and the engagement in the defendant's letter, raises a doubt upon the face of the guarantee as to its true extent; and upon the doubt, thus raised, the construction will be in favour of the surety.

The following authorities are relied on to sustain the construction here claimed: Pothier on Obligations, part 2, sec. 34; Code Napoleon, art. 2011, 2015; Russell *v.* Clarke, 7 Cranch; 1 Mason, 336; 2 Caines's Cases in Error, 29, 49; 10 Johns. R. 180, 325; 8 Wend. R. 516; 7 Wend. 422; 2 Pick. R. 234; 16 Peters, 537; 1 Stark. R. 192; 8 Taunt. 224; 3 B. and A. 594, 595; 1 Crompt. and Mees. 52, 54; 3 Wilson, 530; 1 Term R. 287; 2 So. 370;

3 East, 484; 4 Taunt. 673; 8 Moore, 588; 1 Perry and D. 249; 10 Adolph. and Ellis, 30.

The adjudged cases referred to, giving a construction to bonds with conditions, and contracts made directly between debtor and creditor, afford little aid in arriving at the true understanding of a commercial guarantee. Bonds, &c., are entered into with caution, and often after taking legal advice; they contain the entire contract, beyond which the courts rarely look for circumstances to aid, in their construction. And if there be sureties bound by them, and the meaning is doubtful, the construction is restricted, and made most favourable to the sureties. Such is the result of the authorities cited for the defendant.

On the other hand: letters of guarantee are (usually) written by merchants; rarely with caution, and scarcely ever with precision; they refer in most cases, as in the present, to various circumstances, and extensive commercial dealings, in the briefest, and most casual manner, without any regard to form; leaving much to inference, and their meaning open to ascertainment from extrinsic circumstances, and facts, accompanying the transaction: without referring to which, they could rarely be properly understood by merchants, or by courts of justice. The attempt, therefore, to bring them to a standard of construction, founded on principles, neither known, or regarded, by the writers, could not do otherwise than produce confusion. Such has been the consequence, of the attempt to subject this description of commercial engagement to the same rules of interpretation applicable to bonds, and similar precise contracts. Of the fallacy of which attempt, the investigation of this cause has furnished a striking, and instructive instance. These are considerations applicable to both of the arguments.

The construction contended for as the true one on part of the plaintiffs, is, That the letter of the defendant must be taken in the broadest sense which its language allows; thereby, to widen its application. To assert this as a general principle, would so often, and so surely, violate the intention of the guarantor, that it is rejected. We think the court should adopt the construction which, under all the circumstances of the case, ascribes the most reasonable, probable, and natural conduct to the parties. In the language of this court, in Douglass *v.* Reynolds, 7 Peters, 122,

"Every instrument of this sort ought to receive a fair and reasonable interpretation according to the true import of its terms. It being an engagement for the debt of another, there is certainly no reason for giving it an expanded signification, or liberal construction beyond the fair import of the terms." Or, it is, "to be construed according to what is fairly to be presumed, to have been the understanding of the parties, without any strict technical nicety;" as declared in Dick v. Lee, 10 Peters, 493. The presumption is of course to be ascertained, from the facts, and circumstances accompanying the entire transaction. We hold these to be the proper rules of interpretation, applicable to the letter before us.

The general words not being restricted by the recital, they fairly import that Matthias Bruen was bound to Bell and Grant for the credits they opened in favour of William H. Thorn with Archias and Co.: and for the credits also, they opened in favour of Thorn, with any and every other person; covering those set forth in the three first counts in the declaration: and we think that the Circuit Court erred, by instructing the jury to the contrary.

Whether the guarantee covered the credit extended to Thorn himself, directly, it is not thought necessary to inquire; as no argument was founded on such an assumption; Thorn, who was introduced as a witness in the Circuit Court by the plaintiffs, on his cross-examination declared, that the £3500, mentioned in the last count in the declaration, "had no relation whatever to the guarantee of the defendant:" it being under the guarantee of a different person.

It was insisted also: That when Thorn failed, and the dealings between him and the plaintiffs ceased, they were bound to notify the guarantor, of the existence of the debts due them by Thorn, and for which Bruen was held liable, in a reasonable time after the dealings ceased: that Thorn failed April 10th, 1837; and the notice was not given until December 31st, 1838; the debts sued for in the three first counts of the declaration being then due: therefore the notice was too late, and the defendant discharged.

The record shows that this ground of defence was not brought to the consideration of the Circuit Court: we do not therefore feel ourselves at liberty to express any opinion upon the question.

Again it is insisted: The original arrangement made between the plaintiffs and Thorn, in March, 1831, was subsequently, in the spring of 1834, abandoned and deserted; and in the autumn following, a new and inconsistent one, enlarging the credits to be given, and diminishing the security, was made, rendering notice to the defendant necessary, but to which no notice could have given legal effect to charge the defendant for subsequent credits.

To this, and all other questions raised here, on which the court below was not called to express any opinion, we can only give the same answer, given to the next preceding, supposed ground of defence.

It is ordered, that the judgment of the Circuit Court be reversed, and the cause remanded for another trial thereof.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the southern district of New York, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be and the same is hereby reversed, with costs; and that this cause be and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

ELIZABETH R. CARTWRIGHT, PLAINTIFF IN ERROR, *v.* ALEXANDER T. HOWE, GEORGE F. RICHARDS, AND WILLIAM RICHARDS, DEFENDANTS.

THIS cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Washington, and it having been stated by Mr. Bradley, of counsel for the defendant in error, that the matters in controversy had been agreed and settled between the parties, to which Mr. R. J. Brent, of counsel for the plaintiff in error, assented; it is thereupon now here ordered and adjudged by this court that this cause be and the same is hereby dismissed, with costs.

ISAAC S. BOWMAN AND GEORGE W. S. BOWMAN, —— BRINKER AND MARY, HIS WIFE, FORMERLY MARY BOWMAN, AND REBECCA BOWMAN, BY SAID ISAAC S. AND GEORGE W. S. BOWMAN, THEIR NEXT FRIEND, THE SAID MARY AND REBECCA BEING INFANTS UNDER TWENTY-ONE YEARS OF AGE, AND ALBERT T. BURNLEY, APPELLANTS, *v.* ATHANASIUS WATHEN, AND THE MAYOR AND COMMON COUNCIL OF THE CITY OF JEFFERSONVILLE.

The doctrine laid down by Lord Camden, in the case of Smith v. Clay, 3 Brown's Ch. Rep. in note, examined and confirmed, viz., "That a court of equity, which never is active in relief against conscience or public convenience has always refused its aid to stale demands, where the party has slept upon his rights for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive and does nothing; laches and neglect are always discountenanced; and therefore, from the beginning of this jurisdiction, there was always a limitation of suit in this court."

Also the doctrine laid down by Lord Redesdale, in Hovenden v. Lord Annesley, 2 Sch. and Lef. 636, "that every new right of action, in equity, that accrues to a party, whatever it may be, must be acted upon at the utmost within twenty years."

And though the claimant may have been embarrassed by the frauds of others, or distressed, it is not sufficient to take the case out of the rule.

The doctrine has also been ruled by this court, and should now be regarded as the settled law.

In this case, the complainants have so long slept upon their rights that this court must remain passive, and can do nothing; and this is equally true, whether they knew of an adverse possession, or through negligence and a failure to look after their interests, permitted the title of another to grow into full maturity.

THIS was an appeal from the Circuit Court of the United States for the district of Indiana, sitting as a court of equity.

The facts are fully stated in the opinion of the court, and also the authorities referred to in the argument. It is unnecessary to repeat either.

Crittenden and *Test*, for the appellants.

Berrien and *Legaré*, attorney-general, for the appellees.

Mr. Justice DANIEL delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the seventh circuit and district of Indiana. The complainants in the Circuit Court, the appellants here, filed their

bill in the year 1840. It is alleged and shown, that with the exception of Albert T. Burnley, who is a citizen of Kentucky, the complainants are citizens of Virginia, and heirs and devisees of Isaac Bowman, deceased, who was an officer in the Virginia regiment, known as the Illinois regiment. That in the division and allotment of the lands appropriated by the state of Virginia for compensating the officers and soldiers of this regiment, a tract of land of five hundred acres on the Ohio river, within the county of Clarke, in the then territory and now state of Indiana, was, in 1786, allotted and conveyed to said Isaac Bowman, for his services in the regiment above mentioned. That Bowman, being seised in fee of this land, afterwards, in March, 1802, by a power of attorney under his hand and seal, constituted one John Gwathney, his attorney in fact, with full authority to lay off a town on the same, beginning at the lower part thereof on the river, and to contain one hundred and fifty acres of land. That by this instrument Gwathney was authorized to lay off the town in any manner he might prefer; to convey the title to the land forming the site thereof to proper trustees; to sell the lots on whatever credit he might think proper, and to do every other act which might be necessary for carrying into effect the powers with which the said agent was vested. That Gwathney proceeded to lay off the one hundred and fifty acres of land, to divide them into lots and streets for a town to be called Jeffersonville; reserving two acres for a public square, and certain lots for the benefit of his principal; designating also a portion of land on the margin of the river as a common. That he likewise caused a map or plan of the town to be made and recorded. This plan is made an exhibit in the cause. That, having laid off the town, Gwathney, on the 23d of June, 1802, by indenture, and for the consideration of five shillings therein expressed, conveyed to Marston G. Clarke and others, as trustees of Jeffersonville, the one hundred and fifty acres of land in conformity with the plan adopted; reserving to himself, as attorney for Bowman, the exclusive right of applying the money to arise from sales of the lots; the right also to have and use for and on behalf of Bowman, "whatever right he may now hold as proprietor, to the establishment of one or more ferries." It does not appear that Bowman was ever on the land after its allotment to him; he continued to reside in Vir-

ginia, where he died in the year 1826, having previously made and published his last will, whereby he devised, among other property, the ferry-right mentioned in the deed from Gwathney to the trustees of the town of Jeffersonville. That the devisees of Bowman, to whom were assigned his lands in Indiana and Kentucky, on the 11th of May, 1839, by deed, and for the consideration therein expressed of $20,000, conveyed these lands, together with the ferry-rights above mentioned to the complainant, Burnley, and have united with him in the institution of this suit.

As early as the 12th of October, 1802, little more than three months after the conveyance from Gwathney to the trustees of Jeffersonville, a license was granted by the territorial government of Indiana to Marston G. Clarke, one of the persons named as trustees of the town, to keep a ferry across the Ohio river from the town above mentioned. On the 2d day of July, 1807, a similar license was granted by the same government to one Joseph Bowman. In the month of December, 1822, one George White, having previously purchased the interest of Clarke, and of others claiming under Clarke, the legislature of the state of Indiana passed an act confirming to him the right to keep a ferry from Jeffersonville to the opposite shore of the Ohio.

These acts of the territorial and state governments were public and notorious; were parts of the recorded history of the country; the rights they purported to convey were such as could not be secretly enjoyed, and they appear to have been uninterruptedly exercised by the grantees. The three several ferries granted have been united, and have been transferred by purchase to the defendant, Wathen, conjointly with others, who are non-residents of the state of Indiana; and these purchasers, deriving title from the original grantees, have, from the commencement of their interest, exercised an ownership separately from, and independently of, either Bowman or the complainants, and exempt from any assertion of title by any of them, until the institution of this suit; showing an use and enjoyment of this ferry, for the space of thirty-eight years from the date of the grant to Clarke, and of twenty years from the confirmation by the legislature of the license to White.

The complainants, alleging that the Mayor and Common Council of Jeffersonville, as successors of the original trustees of the

town of Jeffersonville, hold the equitable estate in the ferry for the benefit of the heirs and devisees of Bowman, made the corporation joint defendants with Wathen to their bill; and prayed that the latter might be enjoined from using the ferry; that he might render an account of the profits thereof, and that general relief might be decreed them.

The answer of the defendant, Wathen, repels the claim of the complainants to the ferry, as having any foundation on the alleged reservation in the deed from Gwathney, or on any exception out of the estate passed to the grantees by that deed; relies upon the validity of the grants made by the territorial and state governments; upon the long and uninterrupted use and enjoyment of the ferry under those grants, and upon the position of the defendants as a purchaser without notice.

The corporation of Jeffersonville deny that they were created a corporation by the deed from Gwathney, or that they are the successors of the trustees appointed by that deed; and they claim their corporate character and powers from the authority of the legislature alone; they deny any riparian or ferry privileges as belonging to the complainants in virtue of the deed from Gwathney, and disclaim any part in the controversy between the complainants and Wathen.

Upon the hearing, the Circuit Court dismissed the bill with costs.

In the examination of this cause by the Circuit Court, and in its discussion here, an extensive range of inquiry has been opened, embracing questions upon the operation of that clause in the deed from Gwathney to the trustees of Jeffersonville, which relates to the ferry-rights claimed, as forming either a reservation or an exception according to the principles of the common law, and as affected, therefore, by the presence or absence of words of perpetuity: also upon the connection of these rights with, and their dependence upon, riparian ownership, and upon the necessity for their separation from the sovereign or eminent domain, to permit of their exercise by private persons. These are topics, however, which this court regard as beside the real merits of the present controversy, or as superseded by the true principles upon which it ought to be settled. The real question involved touches neither the definition of ferry privileges nor the modes of their enjoy-

ment; but relates exclusively to the propriety of interfering, at the instance of the complainants below, with those rights as they now are and have been enjoyed by the defendants, and of transferring such rights and enjoyment to the complainants themselves. The complainants are invoking the aid of a court of equity: if they have perfect rights, proper for the cognisance of a different forum, they can have no standing here; if, on the contrary, they require the interposition of this court, they must stand or fall upon the settled principles which govern its action. The frequency and explicitness with which those principles have been announced by this and other tribunals, would seem to dispense with any necessity for their repetition, and to impart somewhat the appearance of triteness to their recapitulation. They have been imbodied by Lord Camden, with a succinctness, and at the same time with a comprehensiveness, compressing within a few sentences almost a system of equity jurisprudence, when he declared, in Smith *v.* Clay, 3 Brown's Chancery Reports, in note, "that a court of equity, which never is active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive and does nothing; laches and neglect are always discountenanced, and, therefore, from the beginning of this jurisdiction, there was always a limitation of suit in this court." In a case very often referred to, Hovenden *v.* Lord Annesley, 2 Sch. and Lef., Lord Redesdale (page 636) lays it down as what he calls the common law of courts of equity, "that every new right of action in equity that accrues to a party, whatever it may be, must be acted upon, at the utmost, within twenty years." Hercy *v.* Dinwoody, 4 Bro. Ch. Rep. 257, was a case wherein the statute of limitations could not directly apply, for there had been a decree for an account that had not been proceeded in with effect; it was a case, therefore, in which the court proceeded according to its discretion, and not by any analogy with the statute of limitations; Lord Alvanley, in deciding this case, puts it upon the ground of public policy, and would not permit the account to be carried on, because the party who would otherwise have been entitled to it, had been guilty of such laches

as to render it impossible to settle the account accurately. In the case already mentioned of Hovenden *v.* Lord Annesley, Lord Redesdale strikingly illustrates the force and inflexibility of the principle on which he had been insisting, when he adverts to and disallows the circumstances adduced and relied on to modify the operation of that principle. After declaring that lapse of time, independently of the statute, would conclude the party in default, he proceeds to remark, that "it never can be a sound discretion in the court to give relief to a person who has slept upon his rights for such a lapse of time; for though it is said, and truly, that the plaintiffs in this suit and those under whom they claim were persons embarrassed by the frauds of others, yet the court cannot act upon such circumstances. If it did, there would be an end of all limitation of actions in the cases of distressed persons; for if relief might be given after twenty years on the ground of distress, so might it after thirty, forty, or fifty; there would be no limitation whatever, and property would be thrown into confusion." So Sir William Grant, in the case of Beckford and others *v.* Wade, 17 Ves. 87, declares that "courts of equity by their own rules, independently of any statutes of limitation, give great effect to length of time, and they refer frequently to the statutes of limitation, for no other purpose than as furnishing a convenient measure for the length of time that ought to operate as a bar in equity of any particular demand."

This doctrine of an equitable bar by lapse of time, so distinctly announced by the chancellors of England and Ireland, has been ruled with equal force by this tribunal in the cases of Prevost *v.* Gratz, 6 Wheat. 481; of Hughes *v.* Edwards, 9 Wheat. 489; of Miller's heirs *v.* McIntyre, 6 Peters, 61; and of Piatt *v.* Vattier et al., 9 Peters, 405. It should now be regarded as settled law in this court.

Can the pretensions of these complainants bear examination by the standard which this rule ordains? The town of Jeffersonville was established, by the agent of the original proprietor of the site on which it stands, in June, 1802. The first ferry was granted by the territorial government in October, 1802; a period almost coeval with the creation of the town itself. This grant (like every other for a similar purpose mentioned in the record) was made in no union or connection of interests with the original

proprietor of the lands, but in a wholly separate and distinct interest. It is proved that the agent of the original proprietor resided in the immediate neighbourhood. He may be presumed, from his agency in laying off and selling the lots, to have been familiar with the localities of the place and with the interests and pursuits of the occupants. He is shown to have had knowledge of the existence of a ferry at the place, and to have availed himself of its accommodation like other passengers. The use of this separate and independent ferry-right has existed from the first grant to the institution of this suit, for a period of thirty-eight years, without an intimation, during this interval, of a right in the complainants or in those from whom they deduce title. Throughout all this time, the holders of this ferry, with a feeling of security which circumstances were well calculated to inspire, have bestowed their care and their means upon an enterprise to which they were prompted, no doubt, by considerations of profit, but one not the less useful or laudable, nor less entitled to protection for that reason: an undertaking highly promotive of public advantage. Can these defendants, under circumstances such as are here enumerated, and consistently with the principles of this court, be now arrested in this enterprise? and this at the instance of persons who may in some sense be regarded as having prompted them to it, if not by express invitation or by the connivance of their agent, yet by their own long abandonment of whatever interest in the subject they may once have possessed? Such a proceeding would not accord with the maxims of a court "which is never active to give relief against conscience or public convenience," or "to a party who has slept upon his rights;" a court which "nothing can call forth into activity but conscience, good faith, and reasonable diligence." In this instance the complainants have slept, long slept upon their rights; by their want of reasonable diligence, others have been induced to embark in an undertaking against which these complainants had power to warn them; with respect to these parties, therefore, this court must remain passive, and can do nothing.

It was insisted in the argument for the complainants, that Bowman, the ancestor, having remained in Virginia until his death in 1826, never had knowledge of an intrusion upon his ferry-rights; and that without such knowledge, no presumption on the score

either of neglect or acquiescence could be allowed against him. In the first place, with regard to the fact of ignorance here assumed, this cannot be admitted; because it is proved that Gwathney, the agent, resided in the immediate neighbourhood: that from his agency in laying off and selling the lots, he was necessarily connected with the affairs of the town; and it is shown, beyond question, that he had knowledge of the existence of the ferry, and had actually used it at an early period after its establishment, though the precise time when, is not ascertained. Let it be conceded, however, that Bowman and his family omitted to inform themselves of the right set up to this ferry by others; it is not perceived how such a concession would strengthen the claim of the complainants, or impair the title of the defendant, as accruing from lapse of time. The defendant, or his grantors, did not enter under Bowman; nor in subordination to any title of his; they have always claimed under grants from a wholly different authority, and adversely to Bowman and to every one else. If Bowman, by negligence, or by a failure to look after and protect his own interests, permit the title of another to grow into full maturity, he thereby recognises the force of the principle of the bar by lapse of time, which creates a title as complete in equity as would be imparted by an express conveyance. This conclusion follows by regular deduction from all the authorities upon this doctrine of lapse of time, and is established by the express language of this court in the case of Boon *v.* Chiles, 10 Peters, 223, where, in speaking of one whose acts may make him a trustee by implication, it holds this language: "His possession enables him to have at least the same protection as that of a direct trustee, who, to the plaintiff's knowledge, disavows the trust, and holds adversely; as to whom the time runs from the disavowal; because his possession from thenceforth is adverse. The possession of the land is notice of a claim to it by the possessor, (Sugd. Vend. 753,) if not held by a contract or purchase; it is from its inception adverse to all the world, and in twenty years bars the owner in law and in equity." In conformity with this doctrine is the decision in Buchannon and others *v.* Upshaw, made during the present term of this court.

We consider the pretensions of the complainants below, the appellants here, to be, upon every correct view, within the opera-

tion of the equitable bar, by lapse of time: we hold, therefore, that the Circuit Court properly dismissed their bill, and we accordingly affirm the decree of that court.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the district of Indiana, and was argued by counsel. On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court in this cause be and the same is hereby affirmed, with costs.

THOMAS E. ELLIS, JONATHAN M. HILL, DANIEL ROPER, AND T. B. BETHEA, PLAINTIFFS IN ERROR, v. THOMAS JONES, ADMINISTRATOR OF MONTRAVILLE D. TAYLOR, DECEASED.

The law of the state of Alabama, passed in 1821, c. 26, s. 5, which authorizes securities to require of the creditor forthwith to put the bond, &c. in suit, against the principal, and absolves the security unless the creditor commences suit and uses due diligence to collect the debt from the principal, does not include a case where the parties (principal and security) unite in a joint and several sealed bill.

THIS case was brought up by writ of error from the Circuit Court of the United States for the southern district of Alabama.

On the 16th of January, 1837, the plaintiffs in error executed the following bill.

$5000 *Wilcox C. H., Ala., January*, 16, 1837

Twelve months after date, we or either of us promise to pay Montraville D. Taylor, or bearer, the sum of five thousand dollars, value received of him, as witness our hands and seals.

THOMAS E. ELLIS, [L. S.]
JONATHAN M. HILL, [L. S.]
D. ROPER, [L. S.]
T. B. BETHEA, [L. S.]

At some time after the date and delivery of the above bill, Taylor, the obligee, died intestate, and Thomas Jones, a citizen of the state of North Carolina, became his administrator.

In November, 1839, Jones brought suit against all the obligors in the Circuit Court of the United States for the southern district of Alabama. The defendants were returned "not found;" but the suit being renewed to March term, 1840, they were all served with process except Hill, who was never reached.

Bethea and Roper severed in their pleas from Ellis. The latter pleaded usury, and that he had only received $4000 for the bill. Bethea and Roper pleaded that they were only sureties, but their plea not being sustained, a jury was empannelled, who found a verdict against the whole three, for $4000. As far as Ellis was concerned, there was no appeal, and the only question before this court was upon the validity of the pleas of Bethea and Roper.

In order to understand these pleas, it is necessary to refer to the laws of Alabama.

The act of 1821, c. 26, s. 5, (found in Aikin's Digest, 2d ed., title "Securities," s. 6, p. 385,) is as follows:

"When any person or persons shall become bound as security or securities, by bond, bill, or note, for the payment of money or any other article, and shall apprehend that his or their principal or principals is or are likely to become insolvent, or to migrate from this state without previously discharging any such bond, bill, or note, it shall be lawful for such security or securities in every such case, (provided an action shall have accrued on such bond, bill, or note,) to require, by notice in writing, of his or their creditor or creditors, forthwith to put the bond, bill, or note, by which he or they may be bound as security or securities, as aforesaid, in suit; and unless the creditor or creditors so required to put such bond, bill, or note in suit, shall in a reasonable time commence an action on such bond, bill, or note, and proceed with due diligence in the ordinary course of law, to recover judgment for, and by execution to make, the amount due by such bond, bill, or note, the creditor or creditors, so failing to comply with the requisition of such security or securities, shall thereby forfeit the right which he or they otherwise would have had, to demand and receive of such security or securities, the amount which may be due by such bond, bill, or note."

Bethea and Roper filed two pleas; the first of which alleged that they were sureties; that Ellis alone received the consideration for the bill; that the intestate knew this; that until the—

day of ———, 1839, Ellis was solvent, in good credit, and had property sufficient to pay the debt; that on the —— day of July, 1838, in the lifetime of the intestate, they gave notice that he was required to institute suit against Ellis; that by reasonable diligence, he could have collected the debt from the principal; that the intestate did not and would not prosecute his demand within a reasonable time thereafter, but did not sue until the commencement of this suit; and that Ellis had become insolvent.

The second plea stated the same, in substance, with the addition that the notice, given to the intestate requiring him to sue, was in writing.

To these pleas a replication was put in, averring, that in the single bill sealed with the seals of the defendants, Bethea and Roper did, jointly and severally with the said Ellis, promise to pay; and thereby admitted themselves as principals in the said note; and that they ought not to be permitted to aver that they are sureties and not principals, nor that they had no interest in the consideration thereof, because of the admission and promise in the bill aforesaid.

To this replication there was a demurrer, and a joinder in demurrer.

The judgment of the court was, that the replication was sufficient in law, and that the demurrer should be overruled; from which judgment Bethea and Roper brought the case up, by writ of error.

R. Johnson, for the plaintiffs in error.

Jones, for the appellee.

Johnson's point was, that the law of Alabama authorizes such a defence as was made by the plea, without regard to the form which the obligation sued upon may assume, when, in fact, the relation of principal and security exists; or, at least, so allows it, if such fact is known to the creditor.

It is averred in the pleadings, that the intestate knew that they were sureties, and that they gave notice to the administrator to proceed against the principal, which notice was given in writing. In 1 Stewart, 11, the plea was the same as in this case; replication that the notice was not in writing; on demurrer, decided in favour of the defendant. 4 Porter, 232, is supposed

to overrule the above, but it is shown not to do so by 9 Porter, 334.

The statute is a cumulative remedy, and it is therefore only necessary to aver the facts neglect and insolvency. The law is the same in New York. See 13 Johns. 174.

As to the second plea: The statute (Aikin's Dig. of Laws of Alabama) requires three things.

1. There shall be a note, &c., for the payment of money.
2. That notice shall be given to the holder.
3. That there must be a neglect on his part.

It is admitted here that the pleas contain all these averments, but the replication says that the obligation being joint and several, all were principals; and the question is, whether, the instrument being under seal, the fact of suretiship can be inquired into. Is the statute applicable to cases where the fact of suretiship does not appear on the face of the instrument?

General rule is, that parol evidence is not admissible to vary written contract; but there are exceptions, one of which is, where two parties are bound, but one is only surety. 2 Stark. ed. of 1834, p. 773, title "Surety." This being the law, the act did not intend to shut it out, for it meant to benefit the surety, and not the creditor. The first, second, and third sections all show this. By the act of 1811, c. 1, s. 2, (same Digest, 164,) parol evidence must be admitted, or the sheriff could not comply with the act. See also act of 1827, c. 27. The cases sustain this. 1 Stewart; 13 Johns. (above cited;) 5 Porter, 443; and 3 Stewart, 9, 160.

Jones, for appellee, maintained, that the replication, though but a re-averment of what sufficiently appears in the declaration and on the face of the cause of action itself, was a good answer to the plea, and was properly sustained on demurrer: that the plea itself was bad on general demurrer, and he was, for that reason, entitled to judgment on the demurrer.

Case in 13 Johnson stands on special ground; the holder of the note had promised to sue the principal. King *v.* Baldwin, 2 Johns. Ch. Rep. 552—554, lays down the rule with great clearness, that if the creditor gives time to principal by a positive act, it discharges the surety. But it must be by a positive act. See 10

Peters, 257; 3 Wheat. 520; 7 Peters, 126. Plea defective, because does not say for how long a time the creditor neglected to sue principal; what is reasonable time is a question of law, and the time must be stated.

Law says where a person is bound as surety: but this case is not so; he is bound as principal. Starkie refers to the case of co-obligors, and not that of obligee against obligor. The case in 9 Porter is where one was bound expressly as surety. Statute is a penal one.

Johnson, in reply.

13 Johnson only re-affirms 7 Johnson, which carried out the English doctrine. 13 Johnson cited with approbation in Sprigg *v.* Bank of Mount Pleasant, 10 Peters, 266. Statute not penal, but remedial. In 1811 began to protect surety, but did not carry it far enough. They substituted a legal presumption of mischief for actual proof, by making notice conclusive. Nothing in the act to require suretiship to be apparent on the face of the instrument. It is admitted that after surety has paid the debt, he may enter up judgment against the principal: did legislature then intend surety to be sued before he should have any relief? In Alabama, all contracts are several as well as joint, and therefore all would be shut out.

Not an open question, 3 Stewart, 9, 160; in 1830 where a bill of surety was dismissed, because he had a defence at law by giving notice to the creditor and did not avail himself of it. 9 Porter says statute is a cumulative remedy.

Jones refers the Court to United States *v.* Bradley, 5 Peters, 264.

The court being equally divided, the judgment of the court below was affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the southern district of Alabama, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

WILLIAM T. MCCLURG, JOHN C. PARRY, AND ENOCH J. HIGBY, PARTNERS, DOING BUSINESS UNDER THE FIRM OF MCCLURG, PARRY, AND HIGBY, ASSIGNEES OF JAMES HARLEY, PLAINTIFFS IN ERROR, *v.* LAWRENCE KINGSLAND, ISAAC LIGHTNER, AND JAMES CUDDY, PARTNERS, DOING BUSINESS UNDER THE FIRM OF KINGSLAND, LIGHTNER, AND CUDDY, DEFENDANTS.

If a person employed in the manufactory of another, while receiving wages, makes experiments at the expense and in the manufactory of his employer; has his wages increased in consequence of the useful result of the experiments; makes the article invented and permits his employer to use it, no compensation for its use being paid or demanded; and then obtains a patent, these facts will justify the presumption of a license to use the invention.

Such an unmolested and notorious use of the invention prior to the application for a patent, will bring the case within the provisions of the 7th section of the act of 1839, c. 88.

The assignees of a patent-right take it subject to the legal consequences of the previous acts of the patentee.

The 14th and 15th sections of the act of 1836, c 357, prescribe the rules which must govern on the trial of actions for the violation of patent-rights; and these sections are operative, so far as they are applicable, notwithstanding the patent may have been granted before the passage of the act of 1836

The words, "any newly invented machine, manufacture, or composition of matter," in the 7th section of the act of 1839, have the same meaning as "invention," or "thing patented."

THIS case was brought up by writ of error from the Circuit Court of the United States for the western district of Pennsylvania.

The facts are sufficiently stated in the opinion of the court.

The bill of exceptions which was taken on the trial below was as follows:

And the plaintiff thereupon excepted to certain parts of the instructions so given by the court to the jury, which instructions so excepted to are hereinafter set forth, to wit:

"It has, however, been urged by the plaintiff's counsel that the right to the continued use is restricted to the 'specific machine, manufacture, or composition of matter so made or purchased,' so that a defendant is protected no farther than in the case of the invention (for which this patent was granted) prior to the application, and is liable to damages if he makes any rolls by Harley's plan afterwards.

"We, therefore, feel bound to take the words, 'newly invented machine,' in the act of 1839, manufacture, or composition of matter and such invention, to mean the invention patented, and the words 'specific machine,' to refer to the thing originally invented, whereof the exclusive right is procured by patent, but not to any newly discovered improvement to an existing patent.

"The use of the patent must be of the same specific improvement originally invented, as was before the application used by any person who had purchased or constructed the machinery on which he operated to produce the effect described in the specification; but when such person confines the future case to the specific mode, method, manner, and process of producing the described effect, it is by the words and true meaning of the law, without liability to the inventor or other person interested in the invention, so construed; and by thus protecting the person who has engaged the use of an invention before the application for a patent, the great object of the patent laws, as declared in the 4th section of the act of 1837, will be consummated; that is, to protect the rights of the public and 'of patentees in patented inventions and improvements.' 4 Story, 2547. A different construction would make it necessary to carry into all the former laws the same literal exposition of the various terms used to express the same thing, and thereby changing the law according to every change of phraseology, make it a labyrinth of inextricable confusion.

"Our opinion, therefore, is, that the defendants have a right to the continued use of the improvement patented to Harley; the facts of the case, which are not controverted, have equal effect with a license, and the evidence brings the defendant under the protection of the act of 1839, by the unmolested notorious use of the invention before the application for a patent. Nothing has been shown on the part of the plaintiffs to counteract the effect of this prior use; as assignees of Harley, they stand in his place as to right and responsibility; they took the patent, subject to the legal consequences of his previous acts, and connecting these with the want of an assertion of a right, to the use by the defendants of the invention patented, till this suit was brought in September, 1835, protects them from liability.

"In our opinion, your verdict ought to be for the defendants. Verdict accordingly, and judgment for defendants."

Dunlap, on behalf of the plaintiffs in error, contended that the court below had erred in charging the jury.

1. That the facts justified the presumption of a license or grant to use the invention, and that defendants were protected thereby, independent of any act of Congress.

2. That the words, "specific machine," in the 4th section of the act of 1839, referred to the invention itself, and that the authority to use it before the patent carried the right to continue to make and use it after the patent had issued.

Mr. Justice BALDWIN delivered the opinion of the court.

This case comes here on a writ of error to the Circuit Court for the western district of Pennsylvania, in an action brought by the plaintiffs, assignees of James Harley, against the defendants, for the infringement of a patent granted to Harley for an improvement in the mode of casting chilled rollers and other metallic cylinders and cones, in which judgment was rendered for the defendants. On the trial it appeared in evidence that it had long been a desideratum to find out some mode by which iron rollers or cylinders could be so cast that when the metal was introduced into the mould it should cause a swyrl or rotatory motion, by which the flog or dross would be thrown into the centre instead of the surface of the cylinder. By the old mode, the metal was conveyed from the furnace to the mould through a gate, or pipe, placed in a horizontal or perpendicular direction. The mode alleged to have been invented by Harley is thus described in the specification annexed to the patent: "The tube or tubes, or passages called gates, through which the metal to be conveyed into the moulds shall not enter the mould perpendicularly at the bottom, but slanting, or in a direction approaching to a tangent of the cylinder, or if the gates enter the moulds horizontally or nearly so, shall not enter in the direction of the axis of the cylinder, but in a tangent form, or inclining towards a tangent of the cylinder."

This was the thing patented, consisting solely in changing the direction of the tube, which conveyed the metal to the mould,

from a horizontal or perpendicular position to an angular one; it produced the desired effect and was highly useful.

The novelty of the invention was much contested at the trial, but as the case turned on other points, that became an immaterial question; as the case comes before us, on exceptions to the charge of the court, which assumed that Harley was the original and true inventor of the improvement, and put the case to the jury on the following facts, which were in full proof, in nowise contradicted, and admitted to be true.

That Harley was employed by the defendants at their foundry in Pittsburgh, receiving wages from them by the week; while so employed, he claimed to have invented the improvement patented, and after several unsuccessful experiments made a successful one in October, 1834; the experiments were made in the defendants' foundry, and wholly at their expense, while Harley was receiving his wages, which were increased on account of the useful result. Harley continued in their employment on wages until January or February, 1835, during all which time he made rollers for them; he often spoke about procuring a patent, and prepared more than one set of papers for the purpose; made his application the 17th February, 1835, for a patent; it was granted on the 3d of March, assigned to the plaintiffs on the 16th of March, pursuant to an agreement made in January.

While Harley continued in the defendants' employment, he proposed that they should take out a patent and purchase his right, which they declined; he made no demand on them for any compensation for using his improvement, nor gave them any notice not to use it, till, on some misunderstanding on another subject, he gave them such notice, about the time of his leaving their foundry, and after making the agreement with the plaintiffs, who owned a foundry in Pittsburgh, for an assignment to them of his right. The defendants continuing to make rollers on Harley's plan, the present action was brought in October, 1835, without any previous notice by them. The court left it to the jury to decide what the facts of the case were; but if they were as testified, charged that they would fully justify the presumption of a license, a special privilege, or grant to the defendants to use the invention; that the facts amounted to "a consent and allowance of such use," and show such a consideration as would support

an express license or grant, or call for the presumption of one to meet the justice of the case, by exempting them from liability; having equal effect with a license, and giving the defendants a right to the continued use of the invention. The court also charged the jury, that the facts of the case, which were not controverted, brought it within the provisions of the 7th section of the act of 1839, by the unmolested, notorious use of the invention, before the application for a patent by Harley, and that nothing had been shown by the plaintiffs to counteract the effect of this prior use. That as assignees of Harley, the plaintiffs stand in his place, as to right and responsibility; they took the assignment of the patent, subject to the legal consequences of his previous acts, and connecting these with the absence of an assertion of a right adverse to the defendants use till this suit was brought, protected the defendants from liability for any damages therefor.

The exceptions to the charge were confined to these two points, which constitute the only subject for our consideration. Whether these exceptions are well taken or not, must depend on the law as it stood at the emanation of the patent, together with such changes as have been since made; for though they may be retrospective in their operation, that is not a sound objection to their validity; the powers of Congress to legislate upon the subject of patents is plenary by the terms of the Constitution, and as there are no restraints on its exercise, there can be no limitation of their right to modify them at their pleasure, so that they do not take away the rights of property in existing patents.

When the patent to Harley was granted, and this suit brought, the acts of 1793 and 1800 were the tests of its validity, but the 21st section of the act of 1836 repealed all existing laws on the subject of patents, with a proviso, that all suits brought before may be prosecuted in the same manner as if that act had not been passed, "excepting and saving the application to any such action, of the provision of the 14th and 15th sections of this act, so far as they may be applicable thereto." This repeal, however, can have no effect to impair the right of property then existing in a patentee, or his assignee, according to the well-established principles of this court in 8 Wheat. 493; the patent must therefore stand as if the acts of 1793 and 1800 remained in force; in other respects the 14th and 15th sections of the act of

1836 prescribe the rules which must govern on the trial of actions for the violation of patented rights, whether granted before or after its passage.

In Pennock *v.* Dialogue, this court held, in 1829, "That if an inventor makes his discovery public, looks on, and permits others freely to use it, without objection or assertion of claim to the invention, of which the public might take notice; he abandons the inchoate right to the exclusive use of the invention, to which a patent would have entitled him, had it been applied for, before such use, and that it makes no difference in the principle, that the article so publicly used, and afterwards patented, was made by a particular individual who did so by the private permission of the inventor." 2 Peters, 14, 15; S. P. Grant *v.* Raymond, 6 Peters, 248, 249; Shaw *v.* Cooper, 7 Peters, 313—323.

On this construction of the acts of 1793 and 1800, Harley's patent would have been void, on the evidence in this case. Such seems to have been the sense of Congress, as expressed in the act of 1832, which authorized the issuing a new patent, when an original one was invalid by accident, inadvertence, or mistake, and without any fraudulent intent, by reason of the terms of the 3d section of the act of 1793 not having been complied with, "Provided, however, that such new patent so granted shall in all respects be liable to the same matters of objection and defence as any original patent, granted under the said first-mentioned act. That no public use or privilege of the invention so patented, derived from or after the grant of the original patent, either under any special license of the inventor, or without the consent of the patentee that there shall be free public use thereof, shall in any manner prejudice the right of recovery for any use or violation of his invention after the grant of such new patent, as aforesaid." 4 Story, 2301.

This act is an affirmance of the principles laid down by this court in the three cases before referred to, and as the exception to the proviso is limited to an use of the invention under a special license of the inventor after the grant of the original patent, it leaves the use prior to the application for such patent clearly obnoxious to the principle established in 2 Peters, 14,.15, whereby the patent would become void.

The same conclusion follows from the 15th section of the act

of 1836, which declares, that if the thing patented "had been in public use, or on sale, with the consent and allowance of the patentee, before the application for a patent," judgment shall be rendered for the defendant with costs. 4 Story, 2511. The case before us is one of this description: the defendants use the invention of Harley for four months before his application for a patent; this use was public, and not only with his express consent and allowance, but he himself made the rollers on the plan he invented during those months, from the time when he had ascertained the utility of his invention.

It would, therefore, be no strained, if not the fair construction of this act, if under such and the other circumstances in evidence in the cause, the court had charged the jury, that if they believed the witnesses, the patent subsequently obtained was void. The Circuit Court, however, did not go so far: they held that the defendants might continue to use the invention, without saying that the public might use it, without liability to the plaintiffs, in which we think there was no error in their direction to the jury; that they might presume a license or grant from Harley, or on the legal effect of the uncontroverted evidence as to the right of recovery, by the plaintiffs, or on the construction of the acts of 1793, 1800, 1832, and 1836.

The remaining exception is to the charge of the court below, on the effect of the 7th section of the act of 1839, which is in these words: "That every person or corporation who has, or shall have purchased or constructed any newly-invented machine, manufacture, or composition of matter, prior to the application by the inventor or discoverer of a patent, shall be held to possess the right to use and vend to others to be used, the specific machine, manufacture, or composition of matter, so made or purchased, without liability therefore to the inventor, or any other person interested in such invention; and no patent shall be held invalid by reason of such purchase, sale, or use prior to the application for a patent as aforesaid, except on proof of abandonment of such invention to the public, or that such purchase, sale, or prior use has been for more than two years prior to such application for a patent." Pamphlet Laws, 1839, 74, 75.

The object of this provision is evidently twofold; first, to protect the person who has used the thing patented, by having pur-

chased, constructed, or made the machine, &c., to which the invention is applied, from any liability to the patentee or his assignee. Second, to protect the rights, granted to the patentee, against any infringement by any other persons. This relieved him from the effects of former laws and their constructions by this court, unless in case of an abandonment of the invention, or a continued prior use for more than two years before the application for a patent, while it puts the person who has had such prior use on the same footing as if he had a special license from the inventor to use his invention; which, if given before the application for a patent, would justify the continued use after it issued without liability.

At the trial below, and here, the plaintiff's counsel have contended, that this act cannot apply to the present case, inasmuch as the protection it affords to the person who had the prior use, is confined to the specific machine, &c., and does not extend to such use of the invention, or thing patented, if it does not consist of a machine, &c., as contradistinguished from the new mode or manner in which an old machine or its parts operates, so as to produce the desired effect; but we think that the law does not admit of such construction, whether we look at its words or its manifest objects, when taken in connection with former laws, and the decisions of this court in analogous cases.

The words "such invention" must be referred back to the preceding part of the sentence, in order to ascertain the subject-matter to which it relates, which is none other than the newly-invented machine, manufacture, or composition of matter constituting the thing patented; otherwise these words become senseless when the invention is not strictly of a machine, &c. Now, in the present case, we find the invention consists solely in the angular direction given to the tube through which the metal is conducted into the cylinder in which the roller is cast. Every part of the machinery is old, the roller itself is no part of the invention, and cannot be the machine, manufacture, or composition of matter contemplated by Congress, nor can the word "specific" have any practical effect unless it is applied to the thing patented, whatever it may be, without making a distinction between a machine, &c., and the mode of producing a useful result by the mere direction given to one of the parts of an old machine. Such a construction

is not justified by the language of the law, and would defeat both of its objects. If it does not embrace the case before us, the consequence would be that the use of the invention, under the circumstances in evidence, would, according to the decision in 2 Peters, 14, 15, invalidate the patent; for if the act operates to save the avoidance of the patent, it must, of consequence, protect the person who uses the invention before the application for a patent. Both objects must be effected, or both must fail, as both parts of the act refer to the same thing, and the same state of things, as affecting the person using the newly-invented machine, or the thing patented, as well as the inventor. Had the words "invention," or "thing patented," been used instead of machine, &c., there could have been no room for doubt of the application of the act to the present case; and by referring to the phraseology of the different acts of Congress denoting the invention, it is apparent that, though there is a difference in the words used, there is none as to their meaning or reference to the same thing. Thus we find in the 14th section of the act of 1836, relating to suits for using "the thing whereof the exclusive right is secured by any patent," in the 15th, "his invention, his discovery, the thing patented," "that which was in fact invented or discovered," "the invention or discovery for which the patent issued," "that of which he was the first inventor." In the 1st section of the act of 1837, "any patent for any invention, discovery, or improvement," "inventions and discoveries;" in the 2d section, "the invention;" in the 3d, "invention or discovery;" in the 4th, "patented inventions and improvements;" in the 5th, "the thing as originally invented." 4 Story, 2510, 2511, 2546.

We, therefore, feel bound to take the words "newly-invented machine, manufacture, or composition of matter" and "such invention," in the act of 1839, to mean the "invention patented," and the words "specific machine," to refer to "the thing as originally invented," whereof the right is secured by patent; but not to any newly-invented improvement on a thing once patented. The use of the invention before an application for a patent must be the specific improvement then invented and used by the person who had purchased, constructed, or used the machine to which the invention is applied: so construed, the objects of the act of 1839 are accomplished; a different construction would

make it necessary to carry into all former laws the same literal exposition of the various terms used to express the same thing, and thereby changing the law according to every change of mere phraseology, make it a labyrinth of inextricable confusion.

We are, therefore, of opinion that there is no error in the charge of the court below, and that its judgment be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the western district of Pennsylvania, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be and the same is hereby affirmed, with costs.

MARY ANN CONNOR, v. HENRY BRADLEY AND MARY, HIS WIFE.

In an action of ejectment, if the plaintiff count upon a lease to himself from a person whom the evidence shows to have been dead at the time, it is bad.

It is a settled rule at common law, that where a right of re-entry is claimed on the ground of forfeiture for nonpayment of rent, there must be proof of a demand of the precise sum due at a convenient time before sunset, on the day when the rent is due, upon the land, in the most notorious place of it, even though there be no person on the land to pay.

In proceeding under the statute of 4 Geo. 2, it must be alleged and proved, that there was no sufficient distress upon the premises on some day or period between the time at which the rent fell due and the day of the demise; and if the time when, according to the proofs, there was not a sufficient distress upon the premises, be subsequent to the day of the demise, it is bad.

THIS case was brought up by writ of error, to the Circuit Court of the United States for the District of Columbia and county of Washington.

The case was this:

In 1807, William Prout, living in the city of Washington, and being the owner, in fee, of a lot in said city, made a lease of a part of it to Joseph B. Parsons, for the term of ninety-nine years, renewable forever. It was in the usual form and contained the usual covenants, (with the exception of the one hereafter

mentioned,) reserving an annual rent of thirty-five dollars, payable on the 13th day of March, clear of all taxes, charges, rates, or assessments whatsoever. There was a covenant that if the said yearly rent of thirty-five dollars should be unpaid at the expiration of sixty days after it was due, and no sufficient effects could be found upon the premises, whereon to levy the same, it should be lawful for Prout, his heirs or assigns, to re-enter and take possession of the leased premises.

The special covenant was to this effect, that if at any time or times thereafter, and before the expiration of the lease, Parsons, or his heirs, executors, &c., should pay to the said Prout, his heirs, executors, administrators or assigns, the sum of $196 87½ cents over and above all rents for said piece of ground that might then be in arrear, that then the said Prout, his heirs, &c., should make and execute a good and sufficient deed of release in fee simple to the said Parsons, his heirs, &c., for the said piece or portion of ground.

In 1813, Parsons died, having occupied the leased property from the time that the lease was made.

In 1815, and prior thereto, the widow of Parsons, who continued in possession of the property, paid to Prout $100 on account of the purchase of the fee simple in the said lot.

In 1823, Prout died; Mary Bradley, one of the lessors of the plaintiff, being one of his surviving children. After Prout's death, the widow of Parsons gave possession of the property in question to Mary Ann Connor, the defendant in the ejectment, who for some time paid the taxes as they accrued, and also paid various sums of money on account of the rent due, and in arrear, and of the accruing rent.

In 1831, a partition of the estate of Prout was made, according to law, among his children, and the leased premises in question were assigned to Mary Bradley. After the partition, Mary Ann Connor made payments on account of the rent to Mary Bradley, and also paid the taxes to the corporation of the city of Washington, up to the year 1831, but omitted to pay the taxes for the years 1831, 1832, 1833, and 1834, amounting in all to $44 33 cents.

In 1835, George Adams, the collector of taxes for the corporation of Washington, after having advertised the property, set up to sale the leasehold interest in the said premises, but receiving

no bid for the same, immediately thereafter exposed to public sale the fee simple interest and estate, which was purchased by one Allison Nailor, for the sum of $49 83 cents, being the amount of taxes due thereon, together with the expense of selling the same. The property had been assessed on the books of the corporation of Washington, from 1813 to 1838, in the name of Joseph B. Parsons's heirs.

On the 2d of June, 1838, the corporation of Washington made a deed of the premises to Allison Nailor, and, in November following, he conveyed them to Mary Ann Connor.

In November, 1838, Henry Bradley, and Mary his wife, brought an ejectment against Mary Ann Connor, counting on two demises; one from William Prout, on the 1st day of January, 1827, and the other from Henry Bradley and Mary his wife, on the 1st day of January, 1838.

The judgment of the court below was for the plaintiffs. Two bills of exceptions were taken, the first of which it is only necessary to notice, and which is stated at large in the opinion of the court.

Brent and *Brent*, for the plaintiff in error, and *Bradley*, for defendant. Only such parts of their arguments will be noted as bear upon the point upon which the court rested their judgment.

Brent, for plaintiff in error, contended, that, as to the first demise, laid on the 1st January, 1827, it was bad, because the evidence showed that Prout died in 1823. 3 Wend. 153.

The second demise is laid on the 1st January, 1838, and the lessor must show a right to re enter on that day; and he cannot have such right unless there be insufficient distress upon the premises. 3 Harris and Johns. 19; 5 Harris and Johns. 175; Adams on Ejectment, 189; 1 Johns. Ca. 283; 6 Cowen, 149; 2 Leigh's N. P. 882, 883, 934; 4 Durnf. and East, 681; 6 Binn. 454; 3 Bibb, 297; 3 Marshall, 134; 3 Monr. 221. The evidence shows that there was not sufficient distress on the premises, on the — day of October, 1838, but not how it was in January, 1838. Evans's Practice, 48; Adams on Ejectment, 150, reciting statute of Geo. 2; 7 Durnf. and East, 117, 120; 2 Leigh's N. P. 924; Doug. 485; 15 East, 286; 2 Chitty's Pleading, 680, note K; 2 Maule and Selw. 529; 6 Cowen, 149.

Bradley. 15 East, 286—288, (referred to in Leigh's N. P.) only says that there must be an insufficiency at the time of the notice, or when the declaration was served. But in this case the tenant sets up an adversary title, and does not come within the rule. Buller, N. P. 96; 6 Johns. Rep. 272.

Connor must be considered as a trustee for the true owner, having obtained the title by fraud. 2 Bos. and Pul. 178; 8 East, 263. Court will direct the jury to presume a deed from trustee to *cestui que trust.* 4 T. R. 682.

Brent, in conclusion, insisted that the demise in the declaration must correspond with the right of entry, which did not accrue until there was an insufficient distress. 8 Peters, 214. Reason of the rule stated in 3 Harris and Johns. 19; 6 Johns. 273. Question of fraud not raised in the bill of exceptions.

Mr. Justice DANIEL delivered the opinion of the court.

At the trial below, the jury having returned a verdict for the plaintiff, the court thereupon adjudged to him his unexpired term in the premises claimed. To the rulings of the court in the progress of the trial two bills of exceptions were sealed at the instance of the defendant. The second of these bills is adverted to merely as making a part of the history of this cause. The questions thereby presented as growing out of the assessment of taxes on lots in the city of Washington, and the modes of proceeding by the corporate authorities to subject the real property of delinquents to sale for arrears of taxes, under the acts of Congress applicable to such subjects, are withdrawn from the action of the court by previous and more material considerations claiming its attention under the first bill of exceptions; and which, in the view of the court, must determine the rights of these parties in their present attitude here. This bill of exceptions is in the following words:

Defendant's first exception.—On this trial of this cause, the plaintiffs, to maintain the issue on their part joined, gave in evidence a lease from William Prout to Joseph B. Parsons, as follows, (copied in page 18,) and proved that the premises in question are the same as those mentioned in said lease; they farther gave evidence, to show that Joseph B. Parsons entered into the

possession of the said premises under the said lease, and continued to occupy them until his death, which happened some time in the year 1813; that he left a widow and seven children, of whom the defendant is one; that his widow was left in the possession thereof at his death, and remained and continued in said possession until the death of said William Prout, which happened some time in the year 1823; that previous to the year 1815, she paid to the said William Prout, $100 on account of the purchase of the fee simple of the said lot; that some time after the death of the said William Prout, the said widow of Joseph B. Parsons abandoned the possession of the said premises to the defendant, and the defendant took possession, thereon claiming to hold the leasehold interest, with the full knowledge and consent of said widow, and of the children of said Joseph B. Parsons; that the defendant thenceforth paid the taxes on the said lot under the said lease, and, from time to time, paid various sums of money on account of the rent due and in arrear under the said lease, and of the accruing rent; that, as appears by the within admission of the defendant filed in this cause, marked A, and as follows, (copied in page 14,) a partition of the estate of said William Prout was made, in March, 1831, among his children; that by that partition, the said premises, and the reversionary interest in the land described in the said lease, was assigned Mary Bradley, one of the plaintiffs, in fee simple; that the square in which the said demised premises are situated, was divided into lots, on the plan of the city of Washington; that after said partition, the said defendant paid moneys on account of said rent, under said lease, to said Mary Bradley, and also paid the taxes to the corporation of the city of Washington, as provided in said lease, to the year 1831; that she failed to pay the taxes for the years 1831, 1832, 1833, and 1834, amounting in all to the sum of $44 33 cents, and the said leasehold interest was set up for sale, and it not producing enough, the fee simple of the ground described in said lease was set up for sale for taxes, and was sold; that at the time of the said tax sale, there was personal property on the said ground, liable for said taxes, more than sufficient to pay such taxes, and the said ground was improved property, having a dwelling-house upon it; that after said tax sale, the defendant promised the plaintiffs to redeem said property, and failed to do so within the two

years next succeeding said sale; that she waited until said two years had elapsed, and then called upon Allison Nailor, the purchaser thereof at said tax sale, and represented to him that she was the owner of the said property, and obtained from him an assignment of his certificate of purchase at said tax sale; that afterwards, the said assignment was cancelled, because the corporation could make no deed to an assignee, and the said Nailor received a conveyance from the corporation of Washington, and then executed a conveyance to the defendant of the premises in question, and the defendant then set up a claim to the premises in fee simple, and adverse to the plaintiffs; that on the — day of October, 1838, there was rent due and in arrear, under the said lease amounting to $193; and that there was not more than $30 of personal property on the said premises, liable to distress for rent, on the — day of October, or at the time of bringing this action; and here the plaintiffs rested. And thereupon, the defendant, by her counsel, prayed the court to instruct the jury that, under the evidence aforesaid, the plaintiffs are not entitled to recover in this action; which instruction the court refused to give, and the defendant excepts thereto, and prays the court to sign and seal this bill of exceptions, which is done accordingly.

W. CRANCH, [L. S.]
JAMES S. MORSELL. [L. S.]

By a comparison of the facts set out in this bill, with the first count in the declaration, it will be seen that the plaintiff has counted upon a lease to him from William Prout of the date of January, 1827, when it is manifest by the proofs adduced by the plaintiff, that Prout died in 1823, four years previously to the existence of the lease. This irreconcilable contradiction between the different parts of the plaintiff's title, as dependent upon the first count, it is unnecessary to comment upon, as the counsel was understood, in the argument, to admit its effects as conclusive to prevent a recovery under that count.

Had the plaintiff in ejectment a right to recover under the demise from Bradley and wife, upon the second count? The foundations for the recovery contended for on behalf of the plaintiff are, a forfeiture of tenure by the defendants, and a right of reentry in the plaintiff, for a breach of the condition in the lease of the premises, by the father of Mary Bradley, one of the lessors

of the plaintiff, to Joseph B. Parsons. It is a settled rule at the common law, that where a right of re-entry is claimed on the ground of forfeiture for nonpayment of rent, there must be proof of a demand of the precise sum due, at a convenient time before sunset on the day when the rent is due, upon the land, in the most notorious place of it, even though there be no person on the land to pay. 1 Saund. 287, note 16, in which are cited 1 Leon. 305; Cro. Eliz. 209; Plowd. 172, b; 10 Rep. 129; Co. Litt. 201, b; 4 Leon. 117; 7 T. R. 117; and numerous other authorities. See also upon the same point, Doe ex dem. Wheeldon *v.* Paul, 3 Car. and Payne, 613, (14 Eng. Com. Law, 483;) and Roe ex dem. West *v.* Davis, 7 East, 363. In this case no proof is adduced or even pretended of a compliance with any one of the requisites just enumerated.

But this suit is said not to be prosecuted upon rules of practice at the common law, but under the authority of the statute of 4 Geo. 2, c. 28, which is in force in Washington county. We will inquire how far the decisions upon the interpretation of this statute have been fulfilled in the case before us. In Doe *v.* Lewis, 1 Burr. 619, 620, the court say that this statute prescribes a method of proceeding in ejectment in two cases, viz.: one in case of judgment against the casual ejector; the other in case of its coming to trial. In the former, an affidavit must be made in the court where the suit is depending, that half a year's rent was due before the declaration was served, and that no sufficient distress was to be found on the premises countervailing the arrears then due, and that the lessor had power to re-enter; in the latter, (that of a trial,) the same things must be proved upon the trial; therefore it is held that this statute does not extend to cases where there is a sufficient distress upon the premises, and consequently in such cases the lessor must proceed at common law as before the statute. To the same effect is the decision in Doe ex dem. Foster *v.* Wandless, 7 T. R. 117. It has been expressly ruled that under the statute of 4 Geo. 2, there must be proof that on some day or period between the time at which the rent fell due, and the day of the demise, there was not a sufficient distress on the premises. Doe ex dem. Smelt *v.* Fuchau, 15 East, 286; and further, that evidence must be adduced showing an examination of every part of the premises, and that where a party omitted to

enter a cottage, this was deemed an insufficient search. 2 Bro. and Bing. 514, (6 Eng. Com. Law.) Of the two demises laid in the declaration, the first is in January, 1827, the second on the 1st of January, 1838. Turning to the first bill of exceptions, we find it stated as having been proved, that on the — day of October, 1838, there was rent due and in arrear, amounting to $193; next, that there was not more than $30 value of personal property on the premises liable to distress for rent on the — day of October, or at the time of bringing this action. It will thus be perceived that the proofs by the plaintiff in ejectment fall short of the requirements of the statute in the following particulars, viz., in failing to show that any examination had been made to ascertain what amount of personal property was upon the premises at any time, or that there was any one day or period of time between the accrual of the rent for six months, and the date of either demise, at which there was a deficiency of personal property on the premises countervailing (to adopt the language of the courts) the arrears then due, for the last demise is dated January 1, 1838, the deficiency is averred to have been in the month of October following; the declaration was served in November, 1838, a still later period of time.

For these defects in the case made by the plaintiff in ejectment, it is the opinion of this court that the instruction prayed by the defendant, as set forth in the first bill of exceptions, ought to have been given; that in refusing such instruction the Circuit Court has erred. Its judgment must therefore be reversed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Washington, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be and the same is hereby reversed, with costs; and that this cause be and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo.*

LESSEE OF SARAH I. JEWELL AND OTHERS, PLAINTIFFS IN ERROR, *v.* BENJAMIN JEWELL AND OTHERS, DEFENDANTS.

The declarations of a deceased member of a family that the parents of it never were married, are admissible in evidence whether his connection with that family was by blood or marriage.

The acts and declarations of the parties being given in evidence on both sides, on the question of marriage, an advertisement announcing their separation and appearing in the principal commercial newspaper of the place of their residence immediately after their separation, is part of the *res gesta*, and admissible in evidence. Whether or not it was inserted by the party, and if it was, what were his motives, are questions of fact for the jury.

If a written contract between the parties be offered in evidence, the purport of which is to show that the parties lived together on another basis than marriage, and the opposite party either denies the authenticity of the paper or alleges that it was obtained by fraud; the question, whether there was a marriage or not, is still open to the jury upon the whole of the evidence.

Upon the two questions, 1st. Whether, "if before any sexual connection between the parties, they, in the presence of her family and friends, agreed to marry, and did afterwards live together as man and wife," it was a legal marriage and the tie indissoluble even by mutual consent; and, 2d. Whether, "if the contract be made *per verba de presenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation," it amounts to a valid marriage, which the parties (being competent as to age and consent) cannot dissolve, and is as equally binding as if made in *facie ecclesiæ*; the court can express no opinion, being equally divided.

THIS case was brought up, by writ of error, from the Circuit Court for the district of South Carolina.

The facts which were not denied were few; nearly all the evidence being of a contradictory character. All this evidence was brought to the notice of this court, in the argument, in consequence of the refusal of the court below to grant the third instruction prayed for by the plaintiffs, which instruction will be stated hereafter.

The admitted facts were these:

About the year 1794 or 1795, Benjamin Jewell became acquainted with Sophie Prevost, a young girl, who, with her family, had shortly before emigrated from the West Indies to Savannah. They lived together and continued to do so for many years. They resided but a short time in Savannah, then removed to Barnwell, in South Carolina, and finally to Charleston. During this time,

many children were born, who were reared in the house where their parents lived, the mother passing by the name of Mrs. Jewell. In the year 1810, they separated by mutual consent, after executing the following paper.

"Articles of agreement between Benjamin Jewell and Sophie Prevost, and receipt of Sophie Prevost, dated 1810 and 1811.

"Articles of agreement entered into this 4th day of December, 1810; Benjamin Jewell on the one part, and Sophie Prevost on the other.

"Whereas, the said Benjamin Jewell and Sophie Prevost have cohabited for several years past, and have had eight children, but are now willing and desirous to separate and live asunder, on certain terms and conditions hereinafter specified: Now this instrument of writing witnesseth, that the said B. Jewell and Sophie Prevost do agree henceforward to live separate and asunder.

"The said B. Jewell, on his part, consents and engages that the said Sophie Prevost shall have under her sole and absolute control, and free from all restraint or control by the said B. Jewell, the following children, viz.: Juliana, Daniel, and Washington, each child having its clothing. The said Sophie Prevost, on her part, engages and consents, that the said B. Jewell shall have under his sole and absolute control, and free from all restraint or control by the said Sophie Prevost, the following children, viz.: Benjamin, Joseph, Hannah, Hetty, and Delia, with their clothing. The said Sophie is to pay all the expenses of clothing, education, and maintenance of the children above allotted to her; and the said Benjamin Jewell is to pay all the expenses of clothing, education, and maintenance of the children allotted to him; and moreover engages to pay for one year's schooling, viz., the sum of $40 for the child Juliana, in order to complete her schooling.

"The said Sophie engages not to disturb the said Benjamin, in respect to the management of the children allotted to him, nor in any manner control or interfere with them. And the said Benjamin engages in like manner in respect to those children assigned to the said Sophie.

"And in consideration of this separation and consent to live asunder, the said Benjamin engages to pay to the said Sophie Prevost the sum of $3000; and to give her a bill of sale of the fellow Jesse, the girl Harriet, the wench Nancy, with her three

children, Charlotte, Mary, and Charles; also, the following articles of furniture, (here follows a list of furniture;) and in consideration of the above, on the part of said Benjamin Jewell, the said Sophie Prevost doth hereby release and discharge the said Benjamin Jewell from all claims and demands whatsoever. In witness whereof, the parties to these presents have set their hands, this 4th of December, 1810. BENJAMIN JEWELL,

"W. L. SMITH. SOPHIE PREVOST."

(*Note.* The signature of W. L. Smith in the original paper is written with pencil.)

It was admitted that Sophie Prevost gave sundry receipts for the cash and furniture mentioned in the above agreement.

It was further admitted, that in June, 1813, Benjamin Jewell was married in Richmond, Virginia, to Sarah Isaacs, by the regular minister of the Hebrew congregation, according to the rites and ceremonies observed by the Jews, soon after which they removed to the state of Louisiana.

In 1818, Sophie Prevost married a man by the name of Storne, continuing to reside in Charleston.

In 1828, Benjamin Jewell died, intestate, in Louisiana; and his widow and children living there, brought an ejectment against his children in Charleston, to recover a house and lot, of which the latter were in possession.

The whole question turned upon the validity of the first marriage; there being no controversy about the validity of the second, in case Jewell, at the time of contracting the second marriage, had not a wife living.

To support the first marriage, it was given in evidence by Sophie Prevost, (who had released her interest in the property in dispute,) and by others, that at the time of the marriage she and her family had recently arrived from the West Indies; that she was very young; that they brought with them some negroes, of whom Jewell received three as her portion; that, in consequence of her being a Catholic and Jewell a Jew, the ceremony of marriage between them was performed by a magistrate named White, in the presence of her family and other persons; that she was entirely ignorant of the English language; that she lived with Jewell as his wife, in his house, and under his name; that they removed to Barnwell district in South Carolina, where also she

associated with the neighbourhood as his wife; that they then removed to Charleston, where Jewell kept a clothing store; that she attended to the concerns of the shop and family as Mrs. Jewell; that the children were circumcised according to the Jewish laws, and that none but legitimate children are so; that she was recognised in society as his wife; that, in 1806, she executed a release of dower in some property which Jewell had mortgaged, and that such release was in the form which the law prescribed for wives; that according to the general opinion among Hebrews, a marriage, in the scriptural sense, between a Christian and a Jewess is not legal; but that the Jewish law considers a connection between a Hebrew man and a Christian woman, as concubinage; that it is the duty of a Jew to obey the laws of the country in which he lives; that, if a divorce be obtained according to their law, by mutual consent, it is not considered unlawful to marry again; that the man writes a paper to the effect that the woman is at liberty to marry again, and the act on the part of the woman is her receiving it and assenting to it.

The evidence offered by the plaintiffs in the suit below, to rebut the idea that a marriage had ever taken place between Jewell and Sophie Prevost was, in the first place, the following paper:

"*Savannah*, 10*th March*, 1796.

"Received of Benjamin Jewell, the sum of five hundred dollars, in full for the cause of action which I brought against him on a promise of marriage; which sum of five hundred dollars, I acknowledge to be in full compensation, and from which I do release and exonerate the said Benjamin Jewell of all actions, demands, or engagements, whatsoever, from the beginning of the world to the present day. [The remaining part of the paper is characterized by the court as gross and indecent, and the Reporter does not think proper to insert it. Its purport was to recognise a continuance of the connection on another basis than marriage.] SOPHIE PROVOST.

"Witness,

"CHARLES HARRIS, GEO. J. HULL."

It was also given in evidence by the plaintiffs that the above paper was recorded in the clerk's office of the Superior Court for Chatham county, (the county in which Savannah is situated,) in

the month of August after its date, on the oath of Mr. Harris, one of the subscribing witnesses. The handwriting of Mr. Harris, who was a distinguished counsellor at law in Savannah, as well as that of Hull, the other subscribing witness, who was a deputy marshal of Georgia, was proved by a judge and by one of the members of the Savannah bar. It was also given in evidence that Charles Harris was of the highest standing and character; was a distinguished man in the state, and understood and spoke French fluently. No other part of the paper was in his handwriting except the words "witness, Charles Harris."

It was also given in evidence by the plaintiffs, that upon an examination of the minutes of the courts, where the record of magistrates still remains, the name of White, who was said to have performed the marriage ceremony, did not appear as a justice of the peace, in Savannah, in the year 1796, or at any time previous.

It was also given in evidence by the plaintiffs, that Jewell and Sophie Prevost were not considered to be married, by one Borbot, the clerk of Jewell, or by the persons with whom he associated.

It was further given in evidence on behalf of the plaintiffs, by the Rev. Mr. Poznanski, the officiating minister of the Hebrew congregation in Charleston, that if a Jew has a child by a person who is not a Jewess, the rite of circumcision may be performed, and that it is not necessary (for circumcision) that the child should be legitimate.

To rebut all this evidence, the defendants gave testimony, by Sophie Prevost or Jewell, that she never signed the paper, purporting to be a release of all damages, &c., or any paper of the kind, and that she never was acquainted with either Harris or Hull; and by R. W. Pooler, the clerk of the court, that aldermen of the Common Council of Savannah were *ex officio* justices of the peace, for all purposes, within the town and hamlets of Savannah, but that he did not know whether or not White was an alderman in the years 1794, 1795, or 1796.

There were two bills of exceptions taken in the court below; the first of which related to the admissibility of certain evidence which the court rejected; and the second to the instructions prayed to be given to the jury, and refused by the court, as also to the instructions actually given.

The first bill of exceptions is as follows, viz.—

The plaintiff, to sustain his action, proved the marriage of Benjamin Jewell, on the 30th June, 1813, with Sarah Isaacs, one of the lessors; the seisin of Benjamin Jewell; his death; and that the other lessors of the plaintiff are the issue of that marriage.

The defendants, to defeat the plaintiff's action, and prove themselves the heirs at law of Benjamin Jewell, examined Sophie Storne, who testified to a prior marriage between her and Benjamin Jewell; and that he held her out as his lawful wife; and that eight children were born during the time they lived together; and offered in evidence, to sustain their defence, the testimony on the part of the defendants contained in the schedule annexed to this bill of exceptions. To rebut which evidence, the plaintiff offered the deeds and papers annexed to this bill of exceptions, signed by Sophie Storne, by the name of Sophie Prevost, and gave evidence that the said Benjamin and Sophie separated in December, 1810; and then offered in evidence, the declarations of one Simons, the deceased husband of one of the defendants, that his wife's mother was not married to her father; which evidence the court overruled, and the plaintiff excepted thereto. And the plaintiff further offered in evidence a file of the Charleston Courier for the year 1811, and showed that the manuscripts or originals, from which the paper of that day was published, are lost or mislaid; and that the Charleston Courier was then the leading commercial paper in Charleston, where the parties lived, and offered to read from the file the following notice, as published on the 22d January, 1811, and for three successive weeks from that time, viz.—

"NOTICE.

"The subscriber forbids all persons from giving credit to Mrs. Sophie Prevost, on his account, as he will pay no debts whatever she may contract.

(Signed,) "BENJAMIN JEWELL."

But the court refused to allow the evidence to be read; to which ruling of the court the plaintiff excepted.

Second bill of exceptions:—And at the trial of the said cause, after the parties had produced the evidence in the schedule hereto

annexed, the plaintiffs desired the said justices to instruct the jury, as follows:

1. That if Sophie Prevost and Benjamin Jewell agreed to live in concubinage, and, under that agreement, cohabited together, the connexion is not matrimony, although they passed themselves off, to other persons, as man and wife.

2. That if Benjamin Jewell and Sophie Prevost asserted, contrary to the fact, that they were married, when, in reality, they had agreed to cohabit without marriage, such assertion will not change the nature of their connexion so as to legitimate the children that were the produce of that union.

3. That if the jury do not believe that Benjamin Jewell and Sophie Prevost were married by a magistrate in Savannah, in the year 1796, or before that time, then there is no evidence of a marriage before them, on which they can find the defendants to be the legitimate heirs of Benjamin Jewell.

4. That if the said Benjamin and Sophie were living in concubinage in 1796, under the agreement produced in evidence, and continued to cohabit together afterwards, such cohabitation will not amount to marriage, notwithstanding their representations to third persons, unless there was a distinct agreement between them to rescind the former agreement, and to stand to each other thenceforward in the relation of husband and wife. And that if such new agreement be relied on, it ought to be established by satisfactory proof, and cannot be inferred from common reputation.

5. That if there was a promise of marriage, followed by sexual intercourse between Benjamin Jewell and Sophie Prevost, and she afterwards sued him for breach of marriage promise, or received a sum of money in satisfaction of the injury done her by refusing to marry her, the promise is thereby released, and the promise and subsequent intercourse do not constitute the parties man and wife.

6. That a promise to marry at a future time, followed by cohabitation, does not constitute marriage, though the promise be accepted at the time when it was made.

And the defendants prayed the justices to instruct the jury:

1. That if they believe that before any sexual connexion between Miss Prevost and Benjamin Jewell, Mr. Jewell and Miss

Prevost, in the presence of her family and his friends, agreed to marry, and did afterwards live together as man and wife, the tie was indissoluble even by mutual consent.

2. That if the jury believe a marriage was celebrated in Savannah by a magistrate, the moment the celebration was over, the contract was perfect and indissoluble.

3. That even if the paper signed in Savannah in March, 1796, was signed by Sophie Prevost, and was so signed when she was unmarried, still it was not an indissoluble contract, but one which the parties were at full liberty to cancel and retract. And that the constant admission by both parties that they were man and wife, their reception in society, his calling her to renounce her dower, are evidence to authorize the jury to draw the conclusion that Mr. Jewell and Sophie Prevost had concluded and agreed to become and live together as lawful husband and wife prior to 1810; and if so, the separation does not affect the right of the children of that marriage; they are legitimate.

And the said justices refused the third instruction prayed by the plaintiffs. And as to the sixth instruction prayed by the plaintiffs, the said justices instructed the jury, that "if the contract be made *per verba de presenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, and which the parties (being competent as to age and consent) cannot dissolve; and it is equally binding as if made in *facie ecclesiæ*." 2 Kent's Com. 86, 3d edit. To which refusal and instruction the plaintiffs except. And the said justices gave the first instruction prayed by the defendants, to which the plaintiffs also except.

Coxe and *Legaré*, attorney-general, for the plaintiffs in error.
Hunt, for defendants.

The following were the points relied upon on the part of the plaintiffs in error:

1. That the declarations of Simons ought to have been admitted in evidence.

2. That the exclusion of the notice in the newspaper was error.

3. That Mrs. Storne was clearly incompetent as a witness, if her testimony was true, she having been the wife of Jewell. She

was also interested in the event of the cause. (This point, however, was not in the bill of exceptions, and was not discussed.)

4. That the instructions asked for by the plaintiffs, and refused by the court, ought to have been given.

5. That there was error in the instruction given at the request of the defendants.

Coxe, for plaintiff in error, entered into a particular examination of the testimony, all of which was before the court, in consequence of the refusal of the court below to grant the third instruction prayed by the plaintiffs, which was, "that if the jury did not believe that Benjamin Jewell and Sophie Prevost were married by a magistrate in Savannah in the year 1796, or before that time, then there was no evidence of a marriage before them."

This investigation, as also that of the counsel who argued the case subsequently, is omitted in the report.

As to the admissibility of Simons's declarations. 1 Stark. 59, (2 Eng. Com. Law, 293;) 1 Maule and Selw. 636; 1 Stark. 69, (2 Eng. Com. Law, 299;) 10 East, 282; 13 Ves. 140; 1 Peters, 328.

As to the admissibility of the publication in the newspaper, 2 Stark. 66, 165, 166, (3 Eng. Com. Law, 247, 296.) That gazette is good evidence to prove public notice, 10 Cond. Ch. Rep. 217.

As to what constitutes marriage, Dalrymple *v.* Dalrymple, 4 Condensed Ecclesiastical Reports, 485, 488, 489; 4 Bac. Abr. title "Marriage;" Easterly *v.* Easterly, Dyer, 305; Bac. Abr. pl. 60; Buller's N. P. 101, 102; 3 Dane's Abr. 294, 299; 18 Johns. 349; 7 Wend. 51; 10 Watts, 158, 161, 162.

Hunt, for defendants.

As to what constitutes marriage, Bracton, b. 1, p. 4, c. 5, s. 7; Swinburne on Espousals, 198, also 5, 6, 7, 223, 224, 226, 227, 234; Taylor on Civil Law, 254, 258, 268, 277, 279; 1 Milton's Paradise Lost, as to the ceremony which took place on the first marriage; 4 McCord, 256; 18 Johns. 347; 4 Johns. 53; 2 Bla. Rep. 877; 1 Dow's Rep. 176, 181; Moore, 170; Manuscript Cases in South Carolina, Strongfellow *v.* Strongfellow, also Billings *v.* Billings, decided by Chancellor Harper; 1 Price's Rep. 83; 6 Mod. 172; 1 Dow's Rep. 189.

As to the admissibility of the newspaper evidence, case of the Berkeley Peerage, 4 Camp. 401.

As to Simons's declarations; no time or circumstances are mentioned when they were made, and he does not testify to general reputation.

Legaré, for plaintiffs.

As to Simons. His declarations were against his interest. Old coats of arms, tombstones, &c. all now admitted. 1 Peters, 337; 13 Ves. 514; Cowp. 591, 594; 2 Russ. and Mylne, 147, 156; 2 Cond. Ch. Rep. 431; Greenl. on Evidence, 159.

As to the newspaper, 7 Peters, 100; Pothier, 295, 296; 6 East, 192; 2 Russ. and Mylne, 435.

As to what constitutes marriage, 6 Serg. and Rawle, 333; 10 Johns. 226, analogous cases of partnership; 2 Barn. and Ald. 387; 18 Johns. 348; 4 Johns. 52; 2 Dow, 462; Cunningham *v.* Cunningham, 2 Dow, 504; North *v.* Valek, Dudley's Ch. Rep.; 6 Binney, 405; 2 Dane's Abr. 302; 2 Cowen's Phillips, 354, collection of cases; Alderson *v.* Clay, 1 Stark. Rep. 405, (2 Eng. Com. Law, 445;) 2 Stark. on Evidence, 590, 688; Kelly *v.* Jackson, 6 Peters, 622, 62; Greenl. on Evidence, 39; 4 Hag. Ec. Rep. 519; Dalrymple *v.* Dalrymple was a clear case of *verba in presenti*; "*accipio te.*"

As to the proof offered that none but the legitimate children of the Jews are circumcised, Gen. xvii. 9.

On the general subject of marriage, Planke's History of Christian Society, vol. 1; Pothier, 5, 30, 38, 39; Swinb. 27, 231, 227; Collins *v.* Jethro, 6 Mod. 155; 3 Dane's Abr. title "Marriage," 301, that the canon law was never adopted in this country; Brown *v.* United States, 8 Cranch, 110; 3 Dall. 281; 2 Bibb's Rep. 343.

Mr. Chief Justice TANEY delivered the opinion of the court.

This is an action of ejectment brought by the plaintiffs in error against the defendants, to recover a house and lot in the city of Charleston, in South Carolina. The plaintiffs claim to be the lawful wife and children of Benjamin Jewell, deceased, who, it is admitted, died intestate and seised of the premises in question. The defendants also claim to be the lawful children of the same Benjamin Jewell, by Sophie Storne, who, before her marriage, was named Sophie Prevost, who is still living and has conveyed all

her interest to her children, and the rights of the parties depend altogether upon the validity of this marriage.

At the trial in the Circuit Court, the verdict and judgment being in favour of the defendants, the case is brought here by a writ of error, sued out by the plaintiffs.

The questions before this court appear in the two bills of exception taken by the plaintiffs. The testimony as set forth in the record is voluminous, and in many instances contradictory. But a very brief statement will show the points of law which have been brought here for revision, and it is unnecessary to encumber the case with the mass of testimony which was offered to the jury by the respective parties, in order to prove or disprove the marriage in controversy.

The plaintiffs proved the marriage of Benjamin Jewell, on the 30th of June, 1812, with Sarah Isaacs, one of the lessors; and that the other lessors of the plaintiff are the issue of that marriage.

The defendants, in order to show that they, and not the plaintiffs, were the heirs at law of Benjamin Jewell, examined Sophie Storne, who stated that she was married to Benjamin Jewell, at Savannah, in Georgia, in 1794 or 1795, by a magistrate whose name she did not recollect, in the presence of several witnesses; that the said Jewell was a Jew, and the witness a Catholic; that her mother would not consent that she should be married according to the Jewish form, and that Jewell would not consent to be married according to their form, and on that account they were married by a magistrate; that they lived together as man and wife many years, and that the defendants are the issue of that marriage; that they at length separated, and she having heard that Jewell was married again, thought that she also had a right to marry, and accordingly married a certain Joseph Storne, with whom she lived some years, and who is since dead. Various acts and declarations of the parties, and the general reputation in the places where they lived, were also offered in evidence on the part of the defendants, to prove that the said Jewell and Sophie had lived together as man and wife, and had constantly acknowledged and spoken of each other as such.

To rebut this evidence, and to show that the connection of the parties was merely concubinage, and not marriage, several instruments of writing, alleged to have been executed by them at dif-

ferent times, were offered in evidence on the part of the plaintiffs, and also various acts of the parties and the general reputation in the places where they lived.

After this evidence on the part of the plaintiffs and defendants had been given to the jury, the plaintiffs offered the declarations of one Simons, (the deceased husband of one of the defendants,) that his wife's mother was not married to her father. It was objected to by the defendants, and rejected by the court.

The plaintiffs also further gave in evidence that the separation took place in Charleston, in the month of December, 1810, where it was admitted that the parties had been living together for many years, and then produced a file of the Charleston Courier for the year 1811, and proved that the manuscripts or originals from which the paper of that day was published are lost or mislaid; that it was at that time the leading commercial paper in Charleston; and thereupon offered to read from the file the following notice, as published on the 22d of January, 1811, and for three successive weeks from that time, viz.:

"NOTICE.

"The subscriber forbids all persons from giving credit to Mrs. Sophie Prevost on his account, as he will pay no debts whatever she may contract. BENJAMIN JEWELL."

But the court refused to allow the evidence to be read; and these two points of evidence form the subject of the first exception.

The second exception brings up the question as to what constituted a legal marriage in Georgia and South Carolina, in one or the other of which states the parties had always lived from the time of their original connection. Several instructions were asked for on both sides, some of which would appear not to have been controverted; and the points before this court will be better understood, by excluding all the prayers on both sides which do not form a part of the exception, and are therefore not now the subjects of review in this court. The exception is confined to the third and sixth instructions asked for by the plaintiffs, and to the first asked for by the defendants. They are as follows:

3. That if the jury do not believe that Benjamin Jewell and Sophie Prevost were married by a magistrate in Savannah, in the year 1796, or before that time, then there is no evidence of a

marriage before them, on which they can find the defendants to be the legitimate heirs of Benjamin Jewell.

6. That a promise to marry at a future time, followed by cohabitation, does not constitute marriage, though the promise be accepted at the time when it was made.

Defendant's prayer. 1st. That if the jury believe that before any sexual connection between Sophie Prevost and Benjamin Jewell, they, in the presence of her family, and his friends, agreed to marry, and did afterwards live together as man and wife, the tie was indissoluble even by mutual consent.

Whereupon the court gave the instruction requested by the defendant, and refused the third instruction asked for by the plaintiff; and upon the sixth directed the jury that if the contract be made *per verba de presenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, and which the parties (being competent as to age and consent) cannot dissolve; and it is equally binding as if made in *facie ecclesiæ*. To this refusal and instruction the plaintiff excepted.

We proceed to examine the questions presented by these exceptions in the order in which they are stated.

The first point in the first exception is upon the rejection of the declarations of Simons, the deceased husband of one of the defendants. It is true that Simons cannot be presumed to have known of his own personal knowledge the particular fact of which he was speaking; and he must have made the statement upon information derived from others. He does not appear to have named the person from whom he obtained his information, nor to have stated that his knowledge was derived from the general understanding and reputation in his wife's family. But the knowledge of events of this description most generally exists in every family, and hence the declarations of one of its members is admissible, although he does not mention the source from which he derived his information; and such declarations are equally admissible whether his connection with the family is by blood or marriage. In the case of Vowles *v.* Young, 13 Ves. 140, testimony precisely similar to that now offered was received; and we think the declarations of Simons ought to have been admitted, and that the Circuit Court erred in rejecting them.

The second point in this exception was upon the admissibility of the advertisement in the Charleston Courier; and upon this point also we differ in opinion with the Circuit Court.

It was admitted that the parties had cohabited together for a long time, and that the defendants were the issue of that intercourse; and in order to prove that their mother was married to Jewell, the acts and declarations of the parties during their cohabitation were offered in evidence by the defendants, (and were unquestionably admissible,) to prove that during that time she was acknowledged and treated by Jewell as his lawful wife. Acts and declarations were also offered on the part of the plaintiffs, to prove the contrary. The separation took place in December, 1810, in Charleston, where the parties had lived together for many years, and this advertisement appeared in the principal commercial paper of the place in the January following. It was offered by the plaintiff, like the acts and declarations above mentioned, on his part to rebut the testimony which had been given by the defendants; and this advertisement would manifestly have been admissible on the same rules of evidence, if it had appeared while the parties were still living together or at the moment of separation. And although they had parted a short time before the publication, yet it followed so immediately afterwards, that it must be regarded as a part of the *res gesta*, and as one of the circumstances connected with the separation and previous cohabitation. Whether it was inserted by Jewell or not; and if it was, what were his motives for so doing, are questions for the consideration of the jury and not for the court. The plaintiff had a right to show the fact that such an advertisement did appear at the time mentioned, and it was with the jury to determine the degree of weight, if any, to which this fact was entitled, taking into consideration all the circumstances under which it appeared.

As relates to the points contained in the second exception, we think the court were right in refusing the third instruction requested by the plaintiffs. In order to explain the question intended to be raised by this prayer, it is proper to state, that in addition to the testimony of Sophie Storne, herein before mentioned, certain acts and declarations of the parties, which it is not necessary to set forth at large, were given in evidence by the de-

fendants, by other witnesses, to prove that the parties were married at Savannah, about the time mentioned by Sophie Storne, and before they cohabited together. The plaintiff, on the contrary, in order to prove that they were not married, and that she went to live with him as his concubine, offered in evidence a paper, purporting to be signed by the parties, and dated March the 10th, 1796, by which there was an open and plain agreement on her part to become the mistress of Jewell. The paper is gross and indecent in its language, and it is unnecessary to state more particularly its contents. The third instruction asked for by the plaintiff is founded upon the assumption that this paper is genuine, and insists that if the marriage did not take place before its date, then the intercourse began under this agreement, and their subsequent cohabitation must be presumed to have been of the same description, unless an actual marriage afterwards was proved. But the answer to the argument is, that the authenticity of the paper is denied by the defendants, who contend that it was fabricated by Jewell, or, if signed by Sophie, that she was entrapped and deceived, and ignorant of its contents. The question, therefore, is open to the jury, upon the whole evidence, to determine upon what terms and in what character the connection originally began; and the evidence offered by the defendants, that they lived together for so many years as man and wife, and treated and spake of each other as such, are certainly admissible to show that a marriage had taken place between them at some time or other, and whether before or after the date of the paper could not be material.

The residue of the instructions contained in this exception all involve the question as to what constituted marriage, at the time of this cohabitation, by the laws of Georgia and South Carolina. The question has, of course, no concern with the nature and character of the union of man and wife in a religious point of view. But regarding it (as a court of justice must do) merely as a civil contract, and deciding in what form it ought to have been celebrated in order to give the parties the legal rights of property which belong to the husband or the wife, and to render the issue legitimate, the Circuit Court held, and so instructed the jury, that if they believed that, before any sexual connexion between the parties, they, in the presence of her family and friends,

agreed to marry, and did afterwards live together as man and wife, the tie was indissoluble even by mutual consent. And that if the contract be made *per verba de presenti*, and remains without cohabitation; or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, and which the parties (being competent as to age and consent) cannot dissolve; and that it is equally binding as if made in *facie ecclesiæ*.

Upon the point thus decided, this court is equally divided; and no opinion can therefore be given. Upon the questions, however, contained in the first exception, the judgment of the Circuit Court must be reversed, and a *venire de novo* awarded.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the district of South Carolina, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be and the same is hereby reversed, with costs, and that this cause be and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

THE PRESIDENT AND DIRECTORS OF THE BANK OF THE METROPOLIS, PLAINTIFFS IN ERROR, *v.* THE PRESIDENT, DIRECTORS, AND COMPANY OF THE NEW ENGLAND BANK, DEFENDANTS.

When there have been, for several years, mutual and extensive dealings between two banks, and an account current kept between them, in which they mutually credited each other with the proceeds of all paper remitted for collection, when received, and charged all costs of protests, postage, &c.; accounts regularly transmitted from the one to the other and settled upon these principles; and upon the face of the paper transmitted, it always appeared to be the property of the respective banks, and to be remitted by each of them upon its own account; there is a lien for a general balance of account upon the paper thus transmitted, no matter who may be its real owner.

THIS case was brought up by writ of error from the Circuit Court for the District of Columbia.

At the trial in the Circuit Court, it appeared upon the evidence that the Bank of the Metropolis, one of the banking institutions of the District of Columbia, had been for a long time in the habit of dealing and corresponding with the Commonwealth Bank of Massachusetts. They mutually remitted for collection such promissory notes or bills of exchange as either might have, which were payable in the vicinity of its correspondent, which, when paid, were credited to the party who sent them, in the account current kept by both banks, and regularly transmitted from the one to the other and settled upon these principles. The costs and expenses, such as protests and postage, were, of course, charged in such account.

The balance was sometimes in favour of one, and sometimes of the other. On the 24th of November, 1837, the Bank of the Metropolis was indebted to the Commonwealth Bank in the sum of $2200, and in the latter part of the year 1837, the Commonwealth Bank transmitted to the Bank of the Metropolis, for collection in the usual way, sundry drafts, notes, and other commercial paper which would fall due in the ensuing months of February, March, April, May, and June. They were endorsed by E. P. Clarke, cashier, and made payable to C. Hood, cashier, and again endorsed by C. Hood, cashier, to G. Thomas, cashier. Clarke was the cashier of the New England Bank; Hood, of the Commonwealth Bank, and Thomas of the Bank of the Metropolis.

On the 13th of January, 1838, the Commonwealth Bank failed, and on that day Charles Hood, the cashier, wrote a letter to the Bank of the Metropolis, directing them to hold the paper which had been forwarded, as above stated, "subject to the order of the cashier of the New England Bank, it being the property of that institution." When this letter was received, the account was examined, and it was discovered that on that day the Commonwealth Bank was indebted to the Bank of the Metropolis in the sum of $2900.

The deposition of Charles Hood, which appeared to have been taken under the act of Congress, was read in evidence by the defendant in error. It stated, among other things, that "the Commonwealth Bank never, at any time, owned any of said notes or obligations, or any part or either of them, and had never any

right, title, interest, claim, or lien thereon, but that the same were at the time of the receipt, and ever afterwards, the property of said New England Bank, and subject to its order and control."

The reading of this deposition was objected to in the court below, and included in the bill of exceptions; but as the objection was not argued in this court, it is presumed to have been abandoned.

The action was brought by the New England Bank against the Bank of the Metropolis, and the judgment in the Circuit Court was in favour of the plaintiff for the whole amount of the proceeds of the notes and bills in question.

At the trial, a bill of exceptions was taken by the defendant, (the present plaintiff in error,) which, after reciting the evidence, concludes as follows:

Whereupon, the counsel for defendants prayed the court to instruct the jury, that, if they shall believe from the said evidence that the Commonwealth Bank did for a series of years transact business with defendants, and did from time to time transmit notes and other commercial paper to defendants for collection, which were all treated by both parties as if the same were the property of the said Bank of the Commonwealth, who were credited in their account current with the proceeds, and charged with the costs and expenses, which accounts were from time to time adjusted upon these principles; that the notes and paper mentioned in said letter of 13th January, 1838, were endorsed and transmitted in the ordinary course of business, without any notification that any other party or person had any interest in said paper, were thus received by defendants, and held by them; that while thus held by them, the said Commonwealth Bank became insolvent or embarrassed in its circumstances, and after such embarrassment the letters aforesaid of the 13th January, 1838, were written, and at the time of their receipt by defendants, said embarrassed state of said Commonwealth Bank was known to defendants, and there was at that period a large balance on general account due defendants from said Commonwealth Bank, and the said paper was all regularly endorsed by the cashier of said Commonwealth Bank to defendants; the said defendants had a right to receive said paper, and the proceeds when recovered, until such balance was paid; and plaintiffs are not entitled

to recover; which instruction, as prayed, the court refused to give.

Coxe, for the plaintiff in error.
Bradley, for the defendant.

Coxe argued, 1. As to the law, supposing the Commonwealth Bank and the Bank of the Metropolis to have been the only parties in the transaction; and, 2dly, How far that law was changed by the intervention of the New England Bank. On the first point, he cited 17 Wend. 100; 1 Ryan and Moodie, 271; 1 Rose's Cases, 280, 80: 5 T. R. 488, 491, 493; 1 Esp. Cases, 66; 2 Bla. Rep. 1154.

As to the second point, he argued that it must have been a secret trust between the two eastern banks, which did not follow the specific paper; and cited 1 Rose's Cases, 238, 242, 246, 248; 7 T. R. 355; 7 Mass. Rep. 319, 324; 2 Vesey, 585.

Bradley, contra. As to the question of lien, 3 Bos. and Pul. 494; 6 T. R. 14; 7 East, 224, that special liens must be sustained by proof; also Burrow, 2221; 6 East, 28; 1 Atk. 236. That the *onus* is on the person who claims a lien, 7 Barn. and Cres. 212, in 14 Com. Law. Rep. 30; 3 Bro. Chan. Cases, 21. No lien for general balance on bills casually left. 7 Taunt. 278; see also 3 Mason's Rep. 222; 1 Maule and Selw. 140; 2 Dall. 60; 1 East, 335; 8 Barn. and Cres. 622, or 15 Com. Law Rep. 319; 7 Bingh. 284; 20 Com. Law. Rep. 130; Doug. 303; 3 T. R. 321; 1 P. W. 318; 3 P. W. 185; 1 Salk. 160; 1 Atk. 234; 2 Barn. and Ald. 327; 3 Barn. and Cres. 376; 1 Peters, 28, 30, 35.

Coxe, in conclusion, examined cases cited on the other side to show that they did not apply, and argued that there was a special usage made out between these two banks. In 1 Livermore on Agency, 261, cases examined, and same distinction drawn as exists here.

Mr. Chief Justice TANEY delivered the opinion of the court.

If this were a question between the two Boston banks, and the case depended upon their respective rights, the plaintiff in the court below would, undoubtedly, have been entitled to

recover; for it is admitted, that although the notes and bills were endorsed to the Commonwealth Bank by the cashier of the New England Bank, yet no consideration was given for them; nor any advances of money made upon them; and they were placed in the hands of the first-mentioned bank as the agent of the other, merely for the purpose of collection. The question, however, is a different one between the parties to this suit, and its solution must depend, not upon the nature of the transactions between these two banks, but upon the dealings between the Commonwealth Bank and the Bank of the Metropolis.

It appears from the evidence offered by the plaintiff in error, that for several years prior to the insolvency of the Commonwealth Bank, (which happened in January, 1838,) there had been mutual and extensive dealings between the two last-mentioned banks, and an account current between them, in which they mutually credited each other with the proceeds of all paper remitted for collection when received, and charged all costs of protest, postage, &c. Accounts were regularly transmitted from the one to the other, and settled upon these principles; and upon the face of the paper transmitted, it always appeared to be the property of the respective banks, and to be remitted by each of them on its own account.

The balances in the account current fluctuated according to the amount of paper they respectively transmitted, and these balances it would seem were generally suffered to remain until they were reduced by the proceeds of the notes and bills deposited with each other in the usual course of their business. Thus, in November, 1837, the Bank of the Metropolis was debtor upon the account in the sum of $2200; but in January, 1838, when notice of the failure of the Commonwealth Bank was received, that balance had been extinguished, and the last-mentioned bank was debtor in the sum of $2900. It is not suggested that any information of the interest of the New England Bank, in the paper in question, was ever communicated to the Bank of the Metropolis until after the insolvency of the Commonwealth Bank. And the question is, whether the plaintiff in error has a right to retain the proceeds of the notes then in its hands to cover the balance of account due upon these transactions.

If the notes remitted had been the property of the Common-

wealth Bank, there would be no doubt of the right to retain; because it has been long settled, that wherever a banker has advanced money to another, he has a lien on all the paper securities which are in his hands for the amount of his general balance, unless such securities were delivered to him under a particular agreement.

The paper in question was, however, the property of the New England Bank, and was endorsed and delivered to the Commonwealth Bank for collection, without any consideration, and as its agent in the ordinary course of business; it being usual, and indeed necessary, so to endorse it, in order to enable the agent to receive the money. Yet the possession of the paper was *prima facie* evidence that it was the property of the last-mentioned bank; and without notice to the contrary, the plaintiff in error had a right so to treat it, and was under no obligation to inquire whether it was held as agent or as owner; and if an advance of money had been made upon this paper to the Commonwealth Bank, the right to retain for that amount would hardly be disputed.

We do not perceive any difference in principle between an advance of money and a balance suffered to remain upon the faith of these mutual dealings. In the one case as well as the other, credit is given upon the paper deposited or expected to be transmitted in the usual course of the transactions between the parties.

There does not, indeed, appear to have been any express agreement that those balances should not be immediately drawn for; but it may be implied from the manner in which the business was conducted; and if the accounts show that it was their practice and understanding to allow them to stand and await the collection of the paper remitted, the rights of the parties are the same as if there had been a positive and express agreement; and such mutual indulgence on these balances would be a valid consideration; and, like the actual advance of money, give the plaintiff in error a right to retain the amount due on closing the account.

It is evident that a loss must be sustained either by the plaintiff or defendant in error by the failure of the Commonwealth Bank. We see no ground for maintaining that there is any superior equity on the side of the New England Bank. It contributed to give to the corporation which has proved insolvent

credit with the plaintiff in error, by the notes and bills which it placed in its hands to be sent to Washington for collection, endorsed in such a form as to make them *prima facie* the property of the Commonwealth Bank, and enabled it to deal with them as if it were the real owner. The Bank of the Metropolis, on the contrary, is in no degree responsible for the confidence which the defendant in error reposed in its agent. And when this misplaced confidence has occasioned the loss in question, it would be unjust to throw it upon the bank which has been guilty of no fault or want of caution, and which was induced to give the credit by the manner in which the defendant in error placed its property in the hands of an agent unworthy of the trust.

If, therefore, the jury find that the course of dealing between the Commonwealth Bank and the Bank of the Metropolis was such as is stated in the testimony; that they always appeared to be, and treated each other as the true owners of the paper mutually remitted, and had no notice to the contrary; and that balances were from time to time suffered to remain in the hands of each other to be met by the proceeds of negotiable paper deposited or expected to be transmitted in the usual course of the dealing between them, then the plaintiff in error is entitled to retain for the amount due on the settlement of the account.

The question, whether the balances were usually suffered to lie for a time on account of negotiable paper actually deposited or expected to be received, and which formed the consideration on which the defence rested, is not perhaps as distinctly stated as it might have been in the hypothetical instruction requested by the plaintiff in error. But we think it is fairly to be inferred from the language used in the prayer, by which the defence is put upon the ground that the paper transmitted was treated by the parties as the property of each other; and as the prayer was rejected without any explanation or qualification, we have no reason for supposing that a different construction was put upon it in the Circuit Court.

The judgment must therefore be reversed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Co-

lumbia, holden in and for the county of Washington, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be and the same is hereby reversed, with costs; and that this cause be and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo.*

BERNARD MCKENNA, PLAINTIFF IN ERROR, *v.* CHARLES B. FISK, DEFENDANT.

After pleading the general issue, it is too late to take advantage of a defect in the writ, or a variance between the writ and declaration.

Actions of trespass, except those for injury to real property, are transitory in their character.

Where the writ mentions a trespass with force and arms upon the storehouse of the plaintiff and a seizure and destruction of goods, it covers a transitory as well as a local action.

In transitory actions, a venue is laid to show where the trial is to take place. It is a legal fiction, devised for the furtherance of justice, and cannot be traversed.

In such actions, such a venue is good without stating where the trespass was in fact committed, with a *scilicet* of the county in which the action is brought.

In the absence of statutory provisions, the courts in the District of Columbia must apply the principles of the common law to such actions, the pleadings, and the proofs.

This case was brought up by writ of error from the Circuit Court of the United States for the District of Columbia and county of Washington.

In the trial of the cause in the court below, the whole of the evidence offered by the plaintiff was shut out by a decision of the court, and the question was solely upon the correctness of this opinion.

The writ was as follows:

The United States of America, to the Marshal of the District of Columbia, greeting:

We command you, that you take Charles B. Fisk, late of Washington county, if he shall be found within the county of Wash-

ington, in your said district, and him safely keep, so that you have his body before the Circuit Court of the District of Columbia, to be held for the county aforesaid, at the city of Washington, on the fourth Monday of November next, to answer unto Bernard McKenna, in a plea, wherefore, with force and arms, &c., at the county of Allegany, in the state of Maryland, to wit, at the county of Washington, he broke into the storehouse of the said Bernard, and seized, took, detained, and destroyed the goods and chattels, and articles of household of the said Bernard, then and there found, and being of a large value, and other wrongs to the said Bernard then and there did, against the peace, dignity, and government of the United States, &c. Hereof fail not at your peril, and have you then and there this writ.

Witness, Wm. Cranch, Esq., Chief Judge of our said court at the city of Washington, the 1st day of May, Anno Domini, one thousand eight hundred and forty.

Issued the 27th day of May, 1840. WM. BRENT, *Clk.*

The declaration was as follows:

Nar.

Washington County, District of Columbia, to wit:

Charles B. Fisk, late of the county of Washington aforesaid, yeoman, was attached to answer unto Bernard McKenna, in a plea wherefore, with force and arms, &c., at the county of Washington aforesaid, he broke into the storehouse of the said Bernard, and seized, took, detained, and destroyed the goods, chattels, and articles of household of the said Bernard, then and there found, and being of a large value, and other wrongs to the said Bernard then and there did, against the peace, dignity, and government of the United States, and to the great damage of the said Bernard.

And thereupon, the said Bernard, by Brent and Brent, his attorneys, complains, that the said Charles, heretofore, to wit, on the — day of September, in the year of our Lord eighteen hundred and thirty-nine, at the county of Washington, in the District of Columbia, with force and arms, &c., seized, took, detained, and destroyed the goods and chattels, to wit, one thousand gallons of spirituous liquors of different kinds; a large quantity of coffee and of tea; various clothing ready made for sale; two hundred bushels of Indian corn; all the promissory notes and accounts of

sundry persons due to the said Bernard, to the amount of at least $400; all the furniture, bedding, and other articles in said storehouse; and also the shantee, or storehouse, in which said goods and chattels then and there were found; the said shantee or storehouse being a temporary building erected by said Bernard, and to be removed by him, and not being part of, or attached to, the freehold or real; all of said goods and chattels, bills, bonds, and accounts belonging to the said Bernard, then and there found, and being of a large value, to wit, of the value of $2000, and carried away and destroyed the same, and converted the same to his own use, and other wrongs to the said Bernard then and there did, against the peace, government, and dignity of the United States, &c. And also, for that the said Charles, to wit, on or about the — day of September, 1839, with force and arms, &c., at the county of Washington, in the District of Columbia, broke and entered a certain other shantee or temporary storehouse of the said Bernard, situate and being in said county of Washington, and then and there made a great noise and disturbance therein, for a long space of time, and then and there forced and broke open, broke to pieces, damaged, and destroyed divers, to wit, bottles, barrels, hogsheads, jugs, and demijohns, containing one thousand gallons of spirituous liquor of different kinds, of, and belonging to, the said Bernard, and broke to pieces, destroyed, damaged, and spoiled divers, to wit, one thousand pounds of coffee; two hundred pounds of tea; one hundred suits of ready-made clothing; two hundred bushels of Indian corn; sundry promissory notes, bonds, bills, and accounts due to said Bernard from sundry persons; and also, sundry planks, timbers, shingles, and other materials in the construction of a certain shantee, also belonging to the said Bernard, then and there found, and of great value, to wit, of the value of $2000, and other wrongs to the said Bernard then and there did, against the peace, government, and dignity of the United States, &c.

And also, during the time aforesaid, to wit, on the day and year aforesaid, at the county aforesaid, seized and took divers other goods and chattels, to wit, one thousand gallons of spirituous liquors of different kinds; a large quantity of coffee and tea; two hundred bushels of Indian corn; $400 in amount of promissory notes, bonds, bills, and accounts due to said Bernard by

different persons; sundry ready-made clothing; and also a certain shantee, all of the goods and chattels, promissory notes, bonds, bills, and accounts of the said Bernard, then and there found, and being of great value, to wit, of the value of $2000, and damaged, spoiled, and destroyed the same, and other wrongs to the said Bernard then and there did, against the peace, government and dignity of the United States. By means of which said several premises, he the said Bernard saith, he is worse, and hath damage of $4000, and therefore he brings suit, &c.

BRENT AND BRENT, *for plaintiff.*

John Doe and Richard Roe, Pledges, &c.

And the bill of exceptions was as follows:

Plaintiff's Bill of Exceptions.

Bernard McKenna
v.
Charles B. Fisk.

At the trial of this cause, the plaintiff, to support the issue on his part joined, offered to give evidence by a competent witness, tending to prove that in the summer of the year 1839, the defendant, with a large force of armed men, came to the shantee, or storehouse, of the plaintiff, in Allegany county, in the state of Maryland, a place not within the jurisdiction of this court, and entered into the same, and then and there seized, took, and carried away the goods and chattels stated in the declaration, and at the same time offered to prove that the said shantee or storehouse was erected by the plaintiff for the purpose of carrying on his trade in merchandise on the line of the Chesapeake and Ohio canal, in said county, at, or near a place called Fifteen Mile Creek; and that, by the usage and practice on the said line of said canal, said shantees were considered temporary buildings, and could be removed or sold at the will and pleasure of the person erecting them; and that the said shantee of the plaintiff was a frame house and had posts in the ground.

And farther offered to give evidence, at the same time, to show the value of said goods and chattels and shantee, at the time of such taking and carrying away and destruction thereof by the defendant and others, to be more than $1000; but the court would not allow the plaintiff to give such offered evidence, or any part thereof, to the jury, but refused to permit the same to be

given; to which decision and refusal of the court, the plaintiff excepts, and this his bill of exceptions is signed, sealed, and enrolled, this 28th day of December, 1841.

W. CRANCH, [L. S.]
JAS. S. MORSELL. [L. S.]
Test: W. BRENT, *Clerk.*

Brent and *Brent*, for the plaintiff in error.
Bradley and *Coxe*, for the defendant.

Brent, for plaintiff. If there be a variance between the writ and declaration, advantage can only be taken of it by plea in abatement. 2 Wheat. 55. First and third counts relate to personal property; second count charges an entry, but also injury to the personalty. Precedents in 2 Chitty's Pleading, 864, and 1 Evans's Harris, 524; cited also Comberback, 324. There is no misjoinder, 1 Chitty on Pleading, 394, edition of 1819; cited also, 1 Durnf. and East, 479; 1 Cowp. 171; case in Cowper since overruled, but not as to the question of pleading. Distinction between transitory and local actions, 1 Cowp. 177, 179; 1 Strange, 646. In 4 Durnf. and East, 503, there was a count for asportation of goods, but plaintiff nonsuited, because there was no proof. 1 Brock. Rep. 208; 1 Carth. 131; 2 Williams's Saund. Rep. 72, note; 2 Peters, 145, where a building erected for purposes of trade is said not to be real estate; 1 Saunders's Plead. 415; 2 Saund. Rep. 74 (a); Rep. Temp. Hard. 121.

Bradley, for defendant, cited 3 B. C. 393; 1 Chitty's Pl. 438; 2 Wilson, 394. After party has appeared, the writ is dead. 1 Bos. and Pul. 647. Suppose declaration good; can it be sustained by proof of an injury committed in Maryland? 1 Taunt. 379. This is essentially an action of trespass *quare clausum fregit*. 2 Saund. Pl. and Ev. 858, marginal page; 1 Chitty's Pl. 271.

Coxe, on same side, insisted that this was essentially an action of trespass *quare clausum fregit*, and that the injuries laid were merely aggravation. Case in 2 Peters only decided the interest between landlord and tenant, and not that the latter was unable to bring trespass for an injury to his possession.

Brent, sen., in conclusion. Only the second count refers to the storehouse; the first and third are for injuries to the personalty. The second is copied exactly from Evans's Harris.

Mr. Justice WAYNE delivered the opinion of the court.

The declaration in this case contains three counts. It is alleged in the first and third, that the defendant, with force and arms, in the county of Washington, seized, took, detained, and destroyed the goods and chattels belonging to the plaintiff, and also the shantee or storehouse in which the goods were found, of the value of $2000. The only difference in the counts is in the specification of the goods destroyed. In the second count, the defendant is charged with having, with force and arms, in the county of Washington, broke and entered a certain other shantee or temporary storehouse of the plaintiff, situate and being in the county of Washington.

The defendant pleaded not guilty, and issue was joined on that plea.

The plaintiff, on the trial, in support of his case, offered evidence to prove, that the defendant, with a large force of armed men came to the storehouse or shantee of the plaintiff, in Allegany county, Maryland, entered into the same, and took and carried away the goods and chattels stated in the declaration, &c., and other evidence was offered to show the value of the goods. The court refused to permit the evidence to be given to the jury. Upon an exception to this ruling, the case is now before this court.

It was first urged in argument, that as the original writ in the case declared that the defendant, with force and arms, &c., broke into the storehouse of the plaintiff, &c., it was such a declaration of the nature of the complaint, which the defendant was required to answer, that it must be considered as the gist of each count, and that there was such a variance between the counts and the writ that it would abate the writ. Admit that this fault exists, and that the nature of the plaintiff's demand must be mentioned in the writ, that the defendant may know before he appears in court the kind of complaint he is required to answer, and that the declaration afterwards filed, or the writ, or both, shall be deficient in some legal requisite, or shall contain irregularity, informality, or mistake, which would abate the writ, the defendant is not here in a situation to avail himself of the fault. He has pleaded not guilty. This plea refers to the counts and not to the writ. It puts the plaintiff to prove the material allegations in his declaration, and the defendant assumes by it to contest them.

To allow, then, a defendant, after the general issue has been pleaded, to avail himself of any defect or mistake in the writ, or variance or repugnancy between the count and the writ, would be, not to try the cause at issue, but would have the effect to take it from the jury and to place it before the court, upon a point of pleading which has not been pleaded, and which is unconnected with the merits of the cause. Such mistakes, either in the writ, or in a variance between the count and the writ, must be taken advantage of by a plea in abatement. And if the mistake or fault is apparent on the face of the declaration, such as a misstatement of the cause of action, it will be a good cause of demurrer. 3 Black. Com. 301; Com. Dig. Abatement, G, I, 8; Willes, 410; 1 Show. 91; 1 Salk. 212; Duvall and Craig, 2 Wheat. 45, 55. The case, then, is not in a condition to enable the defendant to avail himself of the objection. But is there any such variance in this case. We think not. The writ mentions a trespass with force and arms upon the storehouse of the plaintiff, and the seizure and destruction of goods. This puts the defendant in possession of the complaint against him, or what he will be required to answer before he appears in court. It is but the commencement of the suit, and is sufficient, if it advises the defendant of the cause of action, without those particulars which must be set out in the declaration, which, when filed, gives the defendant an opportunity to use any of those defences or pleas to which he may be entitled by the rules of pleading.

It was also urged that the venue laid in each of the counts was so imperfect that the evidence offered could not be received to support either of them. That it could not be received under the second count, for that was *quare clausum fregit* in the county of Washington, and the evidence proved a local trespass, within another jurisdiction or sovereignty; and that it could not be received under the first and third counts; because, though they might be counts, for transitory causes of action, it was necessary to lay a venue where the trespass was committed with a *scilicet*, to let in the evidence at any other place of trial. The evidence offered as to the local count was certainly not competent; but that is because the venue is local, and cannot be changed into any other county than where the trespass to the realty was done, and never can be carried out of the sovereignty in which the

land is. But it is an established rule, that in transitory actions a venue is only necessary to be laid to give a place for trial. Such a venue is indispensable, for without it would not appear in what county the trial was to take place, nor could a jury be summoned to try the issue. Com. Dig. Pleader, C, 20; 1 Cowp. 176, 177; 5 Term Rep. 620; 2 Lev. 227; Bacon's Ab. Venue, C; 3 Term Rep. 387. The venue for trial is a legal fiction, devised for the furtherance of justice, and cannot be traversed. So that, if A becomes indebted to B, or commits a tort upon his person or upon his personal property in Paris, an action in either case may be maintained against A in England, if he is there found, upon a declaration alleging a cause of action to have occurred in an English county, in which the action is laid, without taking notice of the foreign place. 1 Cowp. 177—179. Lord Mansfield said: But as to transitory actions, there is not a colour of doubt but that any action which is transitory may be laid in any county in England, though the matter arises beyond the seas. Mostyn *v.* Fabrigas, 1 Cowp. 161. In Doulson *v.* Matthews and another, 4 D. and East, 503, (a case in all its particulars like this,) which was an action for entering the plaintiff's house in Canada and expelling him, and in which there was a count for taking away his goods, Lord Kenyon nonsuited the plaintiff because the first count was local, and because he had not supported his second count by proof. Buller, Justice, also said: It is now too late for us to inquire whether it was wise and politic to make a distinction between transitory and local actions: it is sufficient for the courts, that the law has settled the distinction, and that an action *quare clausum fregit* is local. We may try actions here, which are in their nature transitory, arising out of a transaction abroad; but not such as are in their nature local. In Rafael *v.* Verelst, 2 W. Black. 1055, which was a trespass committed in the dominions of a foreign prince, De Grey, Chief Justice, said: Crimes are, in their nature local, and the jurisdiction of crimes is local. And so as to the rights of real property, the subject being fixed and immovable. But personal injuries are of a transitory nature, and *sequuntur forum rei.* And though in all declarations of trespass it is laid *contra pacem regis*, yet that is only matter of form and not traversable. The same doctrine in respect to local and transitory actions has been repeatedly affirmed in the courts

of the states of this Union. 1 Stra. 646; 2 W. Black. 1070; 1 Cowp. 176; 4 Term Rep. 503—507; Cowp. 587; 6 East, 598, 599; Com. Dig. Action, 177; 1 Cowp. 161, 177, 178, 184, 344; 2 H. Black. 145, 161; Co. Litt. a, n. 1; 3 Term Rep. 616; 7 Term Rep. 243; 1 Saund. n. 2; Glen *v.* Hodges, 9 Johns. 67; Gardner *v.* Thomas, 14 Johns. 134. It then appears from our books, that the courts in England have been open in cases of trespass other than trespass upon real property, to foreigners as well as to subjects, and to foreigners against foreigners when found in England, for trespasses committed within the realm and out of the realm, or within or without the king's foreign dominions. And it also appears from the authorities which have been cited, that in a transitory action of trespass, it is only necessary to lay a venue for a place of trial, and that such venue is good without stating where the trespass was in fact committed, with a *scilicet* of the county in which the action is brought.

The courts in the District of Columbia have a like jurisdiction in trespass upon personal property with the courts in England and in the states of this Union, and in the absence of statutory provisions, in the trial of them must apply the same common law principles which regulate the mode of bringing such actions, the pleadings, and the proof. It is our opinion, that the exception taken by the plaintiff to the ruling of the court, in respect to the evidence excluded, must be sustained, and we direct the cause to be remanded for further proceedings.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Washington, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be and the same is hereby reversed, with costs, and that this cause be and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo.*

SAMUEL PECK, PLAINTIFF IN ERROR, *v.* MARY YOUNG.

IN error to the Court for the trial of Impeachments and Correction of Error, of the state of New York.

The counsel for the plaintiff in error, having filed a statement in writing, setting forth that the matters in controversy in this case had been agreed and settled between the parties; it is thereupon now here considered and adjudged by this court that this writ of error be and the same is hereby dismissed, at the cost of the plaintiff in error.

THE UNITED STATES *v.* GABRIEL F. IRVING, JAMES E. DEKAY, FRANCIS R. TILLON, AND CHARLES P. CLINCH, SURVIVING EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY ECKFORD, DECEASED.

When a collector is continued in office for more than one term, but gives different sureties, the liability of the sureties is to be estimated just as if a new person had been appointed to fill the second term.

When the accounts of a collector are returned to the Treasury quarterly, and the date of the commencement and expiration of his term of office is on some intermediate day between the beginning and end of the quarter, a re-statement and Treasury transcript of his account up to the end of his term is legal evidence in a suit against the sureties.

Such a re-statement does not falsify the general accounts, but arranges the items of debits and credits so as to exhibit the transactions of the collector during the four years for which the sureties were responsible.

The amount charged to the collector at the commencement of his second term is only *prima facie* evidence against the sureties.

But payments into the Treasury of moneys accruing and received in the second term, should not be applied to the extinguishment of a balance apparently due at the end of the first term. Payments made in the subsequent term, of moneys received on duty bonds, or otherwise, which remained charged to the collector as of the preceding official term, should be so applied.

The settlement of quarterly accounts at the Treasury, running on in a continued series, is not conclusive. The officers of the Treasury cannot, by any exercise of their discretion, enlarge or restrict the obligation of the collector's bond. Much less can they, by the mere fact of keeping an account current in which debits and credits are entered as they occur, and without any express appropriation of payments, affect the rights of sureties.

THIS case came up from the Circuit Court for the southern district of New York, under a certificate of division in opinion between the judges of that court upon the two following points:

1. Whether the transcript from the books and proceedings of the Treasury, given in evidence on the part of the United States to show the indebtedness of Swartwout on the 28th day of March, 1834, on which day the second term of office of said Swartwout expired, was, in this case, competent and legal evidence for that purpose.

2. Whether the payments made by said Samuel Swartwout subsequently to the said 28th day of March, 1834, should be applied to the discharge of his indebtedness existing on said 28th day of March, 1834, or accruing during his second term of office, or whether such payments should be applied to the discharge of his indebtedness accruing after that time.

The facts in the case were as follows:

Swartwout was appointed collector at the port of New York on the 1st day of May, 1829; but his proceedings during this, his first term, have nothing to do with the present case.

On the 29th of March, 1830, his second term commenced, and he was appointed for four years.

On the 22d of June, 1830, he gave a bond for the faithful performance of his duties, in the mode prescribed by law, with several sureties, one of whom was Henry Eckford, whose executors are parties to this suit. The penalty of the bond was $150,000, and the condition ran thus: "Now, therefore, if the said Samuel Swartwout hath truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge all the duties of the said office, according to law, then the above obligation to be void and of none effect; otherwise it shall abide and remain in full force and virtue."

Quarterly accounts were rendered to the Treasury Department, according to law; but they continued to be made out, as they had been during his temporary appointment, running from the 1st of January to the 31st of March, from the 1st of April to the 30th of June, and so on. In these quarterly accounts were stated the various sums received by him on account of the government, and also the payments which he had made on behalf of the United States, although it often happened that the covering war-

rants from the Treasury, the final vouchers for such payments, were not received in time to be returned with said quarterly accounts, in which case they were thrown into the next quarter, when the proper credits were given.

Swartwout's third term of office commenced on the 29th of March, 1834; and the bond which he gave contained a condition similar to the one which has been recited, but Henry Eckford was not one of his sureties. The time, therefore, covered by Eckford was from the 28th of March, 1830, to the 28th of March, 1834, inclusive of the latter day.

In his accounts for 1834, Swartwout continued to make them up for the quarters of the year, as he had done, and his account for the first quarter was brought up to, and ends on, the 31st March. No account was filed by him ending on the 28th of March. The one ending on the 31st shows a large balance of "cash on hand."

In adjusting this account, the auditor began with charging Swartwout with the balance as it stood against him in the preceding account, then charged him with all the moneys which he had received in that quarter. Having given him credit for various sums paid into the Treasury, and paid to individuals under proper authority, he strikes a balance in favour of the United States, which is stated to consist of bonds uncollected, not due, bonds in suit, general bonds for spirits, wines, &c., and cash on hand.

In adjusting the account for the ensuing quarter, ending on the 30th of June, 1834, the auditor brought forward the entire balance standing against Swartwout in the last account, and then proceeded to charge and credit him as before.

In April, 1839, these accounts were re-stated by order of the first comptroller, so as to make the first account end on the 28th of March, 1834, instead of the 31st. The re-statement begins on the 28th of March, 1830, and runs through the whole four years of Eckford's suretiship, ending on the 28th of March, 1834, and shows a balance of cash due to the United States, of $486,455 24 cents. A certified copy of this paper is the transcript mentioned in the certificate of division of opinion in the court below.

Legar, attorney-general, on behalf of the United States.

Lord and *Silas Wright*, for the defendants.

The points presented by the counsel, were—for the plaintiffs:

1. That this transcript is competent and legal evidence to show that Swartwout was, on the 28th March, 1834, indebted to the United States.

2. That the payments made by Swartwout, subsequent to the 28th March, 1834, should not be applied to discharge his debt incurred before, but to discharge that incurred after, that date.

On the part of the defendants the points were as follows:

I. Preliminary references:

1. The form of the collector's bonds is prescribed by law, and expressly assumes the past as well as prospective accountability of the collector. Act 1799, 3 U. S. Laws, 237.

2. The law obliged the collector, once in every three months, and oftener if required, to transmit his accounts, for settlement, to the officers of the Treasury. Act 1799, sec. 21, 3 U. S. Laws, 157; Act 1820, May 15, sec. 2, 6 U. S. Laws, 521.

The law also bound him, as a disbursing officer, to the same duty. Act 1823, Jan. 31, sec. 2, 7 U. S. Laws, 113.

3. The law required the officers of the Treasury Department to examine the accounts submitted, and to state and certify the balances thereof. Act 1817, March 3, sec. 4, 8, and 9, 6 U. S. Laws, 199; and also the references under the preceding proposition.

4. The accounts rendered quarterly to the Treasury, there examined, corrected, and returned to the collector, are binding upon both parties as to all the items embraced in the accounts and included in the adjustment at the Treasury.

II. The balances in the quarterly accounts are to be taken as cash funds, or cash on hand; if so, every consideration, equitable as well as legal, requires them to be treated as the primary fund for subsequent payments, and these payments to be applied accordingly.

III. If the quarterly balances are presumed to be arrears, or defaulting balances, nevertheless the mutual rendering of accounts between the collector and the Treasury Department, to each other, was an appropriation of the payments to the charges, in the order of time in which they stand in those accounts.

IV. The sureties in posterior bonds of collectors of the customs have no equity to be taken into view, even in respect to an appropriation of payments, by mere implication of law.

V. If the sureties on such posterior bonds should be deemed to have an equity against an application of payments, made after the date of their bonds, and during the period covered by it, to an antecedent balance, such application might have the effect to discharge such sureties; the United States cannot, for such a cause, without the consent of the anterior sureties, recall such application, made by accounts rendered, adjusted, and settled, according to law and long usage, and binding as between the United States and the collector.

VI. The re-statement of the account from 1830 to 1834, made at the Treasury in 1839, after the rendering and the settling, at the time of the quarterly accounts, was without authority of law, if it was to affect any previous appropriation of payments; if it was not, it was immaterial and irrelevant. It was in every view without authority of law.

Legaré, for plaintiffs.

1. Whether transcript is evidence.

2. As to the application of payments.

1. The act of 3d March, 1797, 1 Story, 464, declares that a transcript of the account shall be evidence. It is objected that this is not such, because the account is re-stated. But if an account has been once stated, why not state it again? Accounting officers are not judges. Need not re-state, unless some error. Time does not discharge sureties. United States *v.* Kirkpatrick, 9 Wheat. Government is not estopped if new evidence be discovered. 1 Domat, Public Law, title 6. An error may be corrected in a patent. Grant *v.* Raymond, 6 Peters, 241. Where a contract requires to be severed, court will sever it, as with rent. Co. Litt. 742, 215, A; Litt. sec. 244; 1 Roll's Abr. Apportionment, D. So in partnership cases. 3 Bro. Ch. Cases, 4, 44.

As to the second point.

If the opposite doctrine be correct, neither set of securities is responsible, because there is no default in the second term, and the first is paid. 1 Mer. 529, 572. If the debtor does not apply the payment himself, the court will apply it where the security is most precarious. 6 Cranch, 27. Civil law stated in 1 Poth. on Obligations, 338, ed. of 1826. The creditor may make the application. 4 Cranch, 317. A leading case is in 7 Cranch, 572, but

Justice Story dissents from it in 5 Mason's Rep. 82. Securities only liable for what was actually received during the term. 12 Wheat. 509. The responsibility must be severed. 1 Gilpin, 125.

Lord, for defendants:

Custom has been to apply payments as to time, unless something peculiar in the case. Bond of second sureties retrospective; law required it to be so. Sureties must have looked to this, backward as well as forward. Quarterly settlements are required by law. Act of 1799, c. 128, s. 21; May, 1820, c. 625, s. 2; Jan. 1823, c. 138.

Collector is obliged to retain money for various purposes; for example, to pay debentures, &c. The quarterly accounts are settlements, and bind the parties. Act of March 3, 1817, makes it the duty of the government to settle them. *Onus* is on the government. 1 McLean's Rep. 493; 9 Cranch, 230, 237. Presumption is that the accounting officers knew what the collector ought to keep on hand, and allowed him to retain it, aided by his reappointment. Suppose that it was a debt from Swartwout: has it been paid? Rule is, that oldest debt is paid first, unless there be some equity. First, the debtor directs; if he does not, the creditor does; if neither does, the court makes the application. 6 Cranch, 9; 9 Wheat. 720; 4 Mason, 333. In December, 1834, this application was made. Oldest debt most likely to be lost, and policy of government is to throw balances on last securities. Debtor may make the application. 7 Cranch, 575; 9 Wheat. 720; 1 Mer. 604; 3 Sumn. 109; Gilpin, 125; 1 McLean, 493. The collector owed no debt until the government called for its money. Even if money had been borrowed from second surety and paid to government, the payment would have been good. The transcript is not a paper according to law, because the law meant a copy of what was done, not to make out something new.

Wright, on same side.

Debtor has a right to make the application. 2 Vern. 606. If he does not, the creditor may, but he must say before any controversy. 5 Taunt. 596. Either party having declared their intention is bound by it, and cannot change it without the consent of the other. 4 Cranch, 315. If neither party make the application, courts will consult the interests of creditor as well as debtor,

because they will apply it to a debt not bearing interest or not secured, rather than to one bearing interest or secured. In a running account the oldest credits are applied to the oldest debts, and so on, in order of time. 9 Wheat. 720; 2 Strange, 1194; 9 Mod. 427; 4 Mason, 33; 2 Marsh. 319; 1 Mer. 572—611; 2 Barn. and Ald. 39; 3 Bingh. 71; 1 Wash. 128; 2 Brod. d Bingh. 7; 1 Stark. 122; 12 Wheat. 505; 1 Mason, 323; es, 239; Ambl. 55; 5 Mason, 82; 3 East, 484; 1 Bingh. 452; 2 Barn. and Cres. 265; 2 Maule and Selw. 18; 9 Cranch, 212; 1 Gilpin, 125, 106; Theobald, 221; 1 Law Library, 131. The power of the creditor and debtor over payments is the same where there are sureties as where there are none. 4 Mason, 333; 3 Bingh. 71; 9 Cranch, 212. The case in 1 Gilpin, 125, is not justified by either the case in Cranch or the case in Mason. In 1 McLean, 493, the officer was not a disbursing officer, and the bond was not retrospective. Case in 5 Peters, 373, not applicable.

Payments in this case were in fact and in law applied to extinguishment of former balances. Law required accounts to be settled quarterly. Every quarter Swartwout made the application, and it must bind him. So the government officers, also, by bringing down fresh balances. 3 East, 484; 9 Peters, 12; 1 Mason, 323; 14 East, 239; 8 Wend. 403.

Suppose a new person had been appointed who had debited himself with the balance, and the government had assented to it; would not this have discharged principal and surety? and how is it changed if the same man be reappointed?

Legaré, for plaintiffs, in reply.

The question is not now, whether a balance can be shown, but merely whether the evidence is legal; a cash balance is *prima facie* evidence of a debt. Every term of office is a separate responsibility, as to principal and sureties. No matter how the accounts are kept; the law of 1820 cuts through and severs them. Act of 1840, commonly called the Sub-treasury Act, declares the appropriation of public money a felony, and such an appropriation to pay an old debt is the basis of this defence. In 9 Wheat. the bond was given during an executive appointment. The sureties must see that their principals settle every four years. Swartwout was a bailiff or agent, not a debtor. 15 Peters, 432.

See 1 Jac. and Walk. 247. An agent who keeps the money in bank is presumed to be using it for his own benefit. 11 Peters, 61. A debtor paying a debt out of his own money has a right to apply it, but not paying it out of another man's money. He held the money of the government as a mere bailiff, and had no right to do any thing with it but hand it over.

Mr. Justice McLEAN delivered the opinion of the court.

This action was commenced in the Circuit Court for the southern district of New York, against the sureties of Swartwout, late collector of the customs at that city.

Swartwout was appointed collector by the President, the 1st of May, 1829; and continued to serve under such appointment until the 28th of March ensuing. On the 29th March, 1830, his nomination was sanctioned by the Senate, and he continued to serve in the office of collector four years. On the 29th March, 1834, he was again appointed by the President and Senate, for the term of four years.

Under each of the above appointments he gave bond and security, which, after reciting his appointment of collector, &c. provided: "Now, therefore, if the said Samuel Swartwout, hath truly and faithfully executed and discharged, and shall continue truly and faithfully to discharge, all the duties of the said office according to law, then," &c.

The bond on which this suit was brought, is dated the 22d June, 1830.

A transcript of the accounts of Swartwout from the commencement to the termination of his service as collector, was given in evidence, and also a transcript which purports to state the responsibilities arising under the second term of his service.

At the commencement of his second term, a large balance was charged against him, arising under the previous term; and at the commencement of the third term, a balance was charged, as arising under the second term.

In the course of the trial the two following points were raised, on which the judges were opposed in opinion, and the questions were certified to this court.

"1. Whether the said transcript from the books and proceedings of the Treasury, given in evidence, on the part of the United

States, to show the indebtment of said Swartwout, on the 28th of March, 1834, on which day the second term of office of said Swartwout expired, was in this case competent and legal evidence for that purpose."

"2. Whether the payments made by said Samuel Swartwout, subsequently to the said 28th day of March, 1834, should be applied to the discharge of his indebtment existing on the said 28th day of March, 1834, or accruing during his said second term of office, or whether such payments should be applied to the discharge of his indebtment accruing after that time."

By the act of the 2d of March, 1799, collectors of the customs are required, "once in every three months, or oftener if directed, to transmit their accounts for settlement, to the officer or officers whose duty it shall be to make such settlement."

From the transcripts in this case, and the deposition of the late comptroller, it appears that until after 1838, the accounts of collectors of the customs were kept at the Treasury in one continued series of debits and credits, without regard to the terms of the appointments or the different sureties involved.

By the act of May 15th, 1820, the term of appointment of collectors of the customs and other officers named, was limited to four years. Prior to that act, such appointments were made without any limitation as to time, except the pleasure of the President.

The 2d section of the act of 3d March, 1797, provides, that, "in every case of delinquency, where suit has been, or shall be, instituted, a transcript from the books and proceedings of the Treasury, certified by the register, and authenticated under the seal of the department, shall be admitted as evidence," &c. By the 11th section of the act of the 3d March, 1817, the auditors of the War and Navy Departments were authorized to certify accounts the same as the register.

Before the points certified are examined, we will consider the principles involved in the case.

Under the act of 1820, collectors can only be appointed for four years. At the end of this term the office becomes vacant, and must be filled by a new appointment. And each collector is required to give bond and security on entering upon the duties of his appointment, in such sum as shall be designated.

That the collector is responsible for all moneys received by him and not accounted for, without reference to the official terms he may have served, or to any bonds he may have executed, is undoubted. But this is not the case with his sureties. They are responsible only for the faithful performance of his duties, for the term of his appointment. The condition of the bond is, that he hath performed his duties faithfully, and that he shall continue to perform them. But this condition does not extend to his delinquencies under any other appointment.

The bond in question is dated the 22d of June, 1830, and relates to the 29th of March preceding, at which time the term of the collector commenced; and its obligation extends to the 29th of March, 1834. That the sureties are not bound beyond this period, is too clear for controversy. As regards their liability, it is the same as if Swartwout had served only the term covered by their bond. For the faithful performance of his duties under the executive appointment, which preceded the above term, Swartwout gave bond and security; and also, under the new appointment for four years, which he served from the 29th March, 1834. So far as the sureties are concerned, these terms are as separate and distinct as if a different individual had filled each one of them.

The extent of the obligation of the sureties being stated, we are brought to the inquiry, "whether the transcript, given in evidence on the part of the United States to show the indebtment of Swartwout, on the 28th of March, 1834, was legal evidence."

The transcript is certified in the form required by the act of Congress. In the argument no objection was stated, as to the mode of its authentication. But the re-statement of the account by the Treasury officers, showing the liabilities incurred by the collector during the term for which the defendants are bound as sureties, is objected to.

The collector is also a disbursing officer. He is charged with the bonds taken for duties, and is credited for sums paid into the Treasury, and also for drawbacks and other disbursements incident to his office, or which have been made under the order of the Treasury Department. But from the continuous mode of keeping his accounts, without regard to the terms he may have served, the defalcation within any one term does not appear.

At the commencement of each term an amount is charged against the collector, but it may be composed of bonds in suit, not due, and deposited specially, as is found by the items first charged in the general transcript, amounting to more than eleven millions of dollars. The balance charged, therefore, at the commencement of any quarter or term, does not show that the collector is in default. He may, indeed, stand charged with money actually paid into the Treasury by him, but for which he has received no credit, as what is called a covering warrant has not been issued. Until this shall be done the credit cannot, by the usage of the department, be given.

To meet the necessary disbursements, a sufficient sum of money should always be under the control of the collector. And it is understood to be the usage of the collector, under the sanction of the department, to retain such sum.

From this, it appears that the general transcript affords no sufficient data on which to charge the sureties for any term of office, where, as in the present case, the same person has served as collector several terms.

It is contended that the duties of the Treasury officers charged with the settlement of these accounts are in their nature judicial; and that when an account is once settled it is conclusive on the government, and can only be opened for correction by a suit in court. That in the present case, as credits were given in the account current, which more than paid the moneys received within the four years under examination, the sureties must stand discharged of all liability. And, that although these payments were in part made from moneys received, after the expiration of the above term, the credit must stand as entered.

If this be a sound argument, by the mode of keeping these accounts in the Treasury Department, all sureties of collectors, except those for the last term, are discharged. And it is supposed that this construction would impose no hardship or injustice on the last securities; that, as the bond binds them for the past as well as the future conduct of the collector, they must inquire what amount is charged against him at the commencement of the term for which they are bound.

Now the retrospective obligation of the bond is as much limited by the term of the new appointment as the prospective. And in

this view it would be as logical and just to hold that the sureties are liable for defalcations after the expiration of the term as for those which occurred before its commencement. There is no such condition in the instrument. It recites the new appointment, and, by consequence, limits the obligation to the term of office fixed by law.

The rule as to the appropriation of payments by debtor or creditor in the ordinary transactions of business, is earnestly relied on as applicable to the present case. And all the leading authorities on this subject are referred to. In the case of Devaynes *v.* Noble, &c., 1 Mer. 606, the doctrine which governs the application of payments was elaborately considered. But the applicability of this doctrine is not admitted. We think the rule established by this court in the case of the United States *v.* January and Patterson, 7 Cranch, 572, is the true one. In that case the court say: "The debtor has the option, if he think fit to exercise it, and may direct the application of any particular payment at the time of making it. If he neglects to make the application, the creditor may make it; if he also neglects to apply the payment, the law will make the application." But the court add, "A majority of the court is of opinion that the rule adopted in ordinary cases is not applicable to a case where different sureties under distinct obligations are interested."

The Treasury officers are the agents of the law. It regulates their duties, as it does the duties and rights of the collector and his sureties. The officers of the Treasury cannot, by any exercise of their discretion, enlarge or restrict the obligation of the collector's bond. Much less can they, by the mere fact of keeping an account current, in which debits and credits are entered as they occur, and without any express appropriation of payments, affect the rights of sureties. The collector is a mere agent or trustee of the government. He holds the money he receives in trust, and is bound to pay it over to the government as the law requires. And in the faithful performance of this trust the sureties have a direct interest, and their rights cannot be disregarded. It is true, as argued, if the collector shall misapply the public funds, his sureties are responsible. But that is not the question under consideration. The collector does not misapply the funds in his hands, but pays them over to the government, without any spe-

cial direction as to their application. Can the Treasury officers say, under such circumstances, that the funds currently received and paid over shall be appropriated in discharge of a defalcation which occurred long before the sureties were bound for the collector, and by such appropriation hold the sureties liable for the amount? The statement of the case is the best refutation of the argument. It is so unjust to the sureties, and so directly in conflict with the law and its policy, that it requires but little consideration.

If the collector be in default for a preceding term, it is the duty of the Treasury Department to require payment from him and his sureties for that term. To pay such defalcation out of accruing receipts during a subsequent term, even with the assent of the collector, would be a fraud upon the sureties for such term. The money in the hands of the collector is not his money. Without a violation of his duty, he cannot appropriate it as such. He pays it over in the performance of his duty—the duty which the sureties have undertaken that he shall faithfully perform. And shall the sureties not be exonerated? The collector has done all that they stipulated he should do. How, then, can they be made responsible? It is contended that their responsibility arises, not from the default of the collector, but from the appropriation of his payments by the Treasury. This, at least, is the fair result of the doctrine advanced. For, if such appropriation is properly made by the Treasury, in payment of a defalcation of the collector before the commencement of the current term, it must follow that the sureties for such term are responsible for the amount thus paid.

The government must show the amount of the defalcation of the collector during the term for which the defendants were sureties, to charge them; and this is not done on the face of the general transcript. It is necessary, therefore, to have a re-statement of the account for this purpose: This re-statement does not falsify the general account, but arranges the items of debits and credits so as to exhibit the transactions of the collector during the four years in question. Whether this be done by depositions, or in the form of a transcript, may not be material.

We think that the transcript or re-statement of the account, as explained by the depositions, was competent evidence to the jury.

This statement, as appears from the deposition of Tarbutt, is defective in not giving all the credits to which the collector was entitled; but as it relates to the matter in controversy, it is evidence. The jury will determine what effect it shall have.

The amount charged to the collector, at the commencement of the term, is only *prima facie* evidence against the sureties. If they can show by circumstances or otherwise, that the balance charged in whole or in part had been misapplied by the collector prior to the new appointment, they are not liable for the sum so misapplied. If the sum charged consists of duty bonds, the defendants may show that the bonds were never paid. These remarks apply to the sureties under every new appointment of the collector, and to the balance charged against him.

On the 29th of March, 1834, a new official term of Swartwout commenced, and new securities were given. On that day a large apparent balance was due to the government by him. Now the inquiry should be, of what did that balance consist? Did it arise from a misapplication of the public money during the preceding term? If so, the sureties of the preceding term are liable for the amount thus misapplied. But if there was no misapplication of the public money by the collector, and he paid over to the government, or to its order, all the moneys he received during the official term for which the defendants were his sureties, however such payments may have been appropriated by the Treasury, the sureties are discharged.

In answer to the question, "whether the payments made by the collector subsequently to the 28th of March, 1834, should be appropriated in discharge of his indebtment on that day," we say, that so far as such payments were made of moneys accruing and received in the subsequent term, they should not be so applied. But so far as payments were made in the subsequent term of moneys received on duty bonds or otherwise, which remained charged to the collector, as of the preceding official term, such payments should be appropriated in discharge of the indebtment of the collector for that term. The sureties are only responsible for a misapplication of the public money during the four years preceding the 29th of March, 1834. And of course the extent of this responsibility must be shown by the government. As before remarked, the Court consider the official terms as distinct and

separate, in regard to the sureties, as if different persons had served in the three terms specified; that the legal responsibilities of the sureties are not and cannot be affected by any action of the Treasury Department. If liable, the sureties are made so by their contract; and the government, being a party to that contract, cannot, without the consent of the defendants, change its legal or equitable effect.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the southern district of New York, and on the points and questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this Court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this Court,

1st, That the transcript from the books and proceedings of the Treasury, given in evidence on the part of the United States, to show the indebtedness of Samuel Swartwout on the 28th day of March, 1834, on which day the second term of office of said Swartwout expired, was, in this case, competent and legal evidence.

2d, That the payments made by said Samuel Swartwout subsequently to the said 28th day of March, 1834, should be appropriated in discharge of his indebtedness on that day, so far as said payments were made, in the subsequent term, of moneys received on duty bonds or otherwise, which remained charged to the collector as of the preceding official term; but not where such payments were made of moneys accruing and received in the subsequent term.

Whereupon it is now here ordered and adjudged by this Court, that it be so certified to the said Circuit Court.

WILLIAM NELSON, A PETITIONER IN BANKRUPTCY, *v.* DANIEL CARLAND, AN OPPOSING CREDITOR.

Upon questions adjourned from the District to the Circuit Court under the "Act to establish a uniform system of bankruptcy throughout the United States," the district judge cannot sit as a member of the Circuit Court, and, consequently, the points adjourned cannot be brought before this court by a certificate of division.

Nor will an appeal or writ of error lie from the decision of the Circuit Court; and it is conclusive upon the district judge.

THE case came up on a certificate of division in opinion between the judges of the Circuit Court of the United States for the district of Kentucky. The facts are set forth in the opinion of the court.

Mr. Chief Justice TANEY delivered the opinion of the court.

In the case of William Nelson, petitioner in bankruptcy in the Kentucky district, against Daniel Carland, an opposing creditor, several points were adjourned by the District to the Circuit Court. Upon the hearing in the last-mentioned court, the district judge, as well as the justice of the Supreme Court, sat in the case; and being opposed in opinion upon the questions adjourned, they were certified to this court upon the motion of the counsel for the petitioner.

The first question that presents itself upon this certificate is, whether the Supreme Court have jurisdiction in the matter in this form of proceeding. And after examining the printed argument filed by the counsel for the petitioner, and carefully considering the subject, the court are of opinion that the district judge cannot sit as a member of the Circuit Court, upon questions adjourned to that court, under the "Act to establish a uniform system of bankruptcy throughout the United States;" and that, consequently, the points adjourned cannot be brought before this court by a certificate of division. Nor will an appeal or writ of error lie from the decision of the Circuit Court; and it is conclusive upon the district judge.

In delivering the opinion of the court, it is, however, proper for me to say, that I dissent from that part of it which excludes

the district judge from sitting as a member of the Circuit Court in a case of this description. Yet I concur in the judgment dismissing these proceedings; being of opinion that the act of Congress of 1802, authorizing the certificate of division where the judges of the Circuit Court are opposed in opinion, does not apply to the peculiar and summary jurisdiction directed to be exercised in cases of bankruptcy.

The proceedings must therefore be dismissed for want of jurisdiction.

Mr. Justice CATRON dissented.

On a petition for a discharge, the district judge adjourned into the Circuit Court the question—Whether the act of 1841, establishing a uniform system of bankruptcy, was constitutional, or otherwise. The judges were divided in opinion on the question, and a certificate of division was made to the Supreme Court; calling upon this court to decide the question, and return it so decided, to be entered as the judgment of the Circuit Court.

The district judge may adjourn into the Circuit Court any question, whether he has, or has not, doubts regarding its decision. Its importance is a sufficient reason. That he properly adjourned the question, whether the bankrupt law was or was not constitutional, is free from doubt. Of this question, the Circuit Court had full and proper jurisdiction; and the decision of it would have been conclusive of the case before us.

Was it a "question" on which the judges could divide in opinion?

The act of April 29, 1802, provides: "That whenever any question shall occur before a Circuit Court, upon which the opinion of the judges shall be opposed, the point upon which the disagreement shall happen, shall during the same term, upon the request of either party, or their counsel, be stated under the direction of the judges, and certified under the seal of the court, to the Supreme Court, at their next session to be held thereafter; and shall, by the said court, be finally decided. And the decision of the Supreme Court, and their order in the premises, shall be remitted to the Circuit Court, and be there entered of record, and shall have effect according to the nature of the said judgment and order: Provided, That nothing herein contained

shall prevent the cause from proceeding, if, in the opinion of the court, further proceedings can be had without prejudice to the merits."

The act declares, when any "question shall occur before the Circuit Court," &c., then, on a division, a certificate shall be made at the request of either party. No matter in what form of proceeding it occurs, be it at law or in equity; divisions are nearly as frequent in causes in equity as at law. Under the bankrupt law, the proceedings are in the form prescribed to courts of equity.

Now, "did a question occur," in the Circuit Court? It must be admitted that one of the gravest occurred that could be presented to a court of justice: there it was to be decided, and the case concluded by its decision. The judges were opposed, and it could not be decided: then it was their duty, at the request of either party, to send it to this court, to decide for the Circuit Court; where the decision of the Supreme Court is to be entered as the judgment of the Circuit Court.

So far the case presented, seems to be sufficiently clear: but it is met by another consideration; and that is, whether the Circuit Court, in a question adjourned under the 6th section of the bankrupt law, consists of the two judges, or of the circuit judge only. In all other cases, in the Circuit Courts of the United States, except in writs of error and appeals from the District Court to the Circuit Court, (an exception made by positive legislation;) the two judges have equal powers—they constitute the Circuit Court usually; and must do so when a division takes place: does the bankrupt law cut off these powers of the district judge? The law does not so provide; and can it be justly inferred? If the district judge cannot be a member of the court on the hearing of the adjourned question, then no division of course can take place. To come at the inference of his exclusion, the intention of Congress must be ascertained from the whole scope of the act.

Great questions were involved in its construction. It was to be administered by more than thirty judges, acting separately; no appeal to the Circuit Court was allowed, save in a single case: that of a refusal to finally discharge the bankrupt from his debts, (sec. 4;) and then the Circuit Court is commanded, if the bankrupt shall be found entitled to the benefits of the act, "to make a

decree of discharge, and grant a certificate, as provided in this act." No appeal is allowed to this court from the decree of the Circuit Court: the creditor is not allowed an appeal, either from the District Court to the Circuit Court, or to the Supreme Court, in any case. Nor is the debtor allowed an appeal from the decree of the Circuit Court, refusing his discharge. Such is the unanimous opinion of my brethren now present; and with which opinion I concur. If the discharge is objected to by the creditors, and the District Court refuses it, the debtor may then demand a trial by jury, and try the matter over again: if the jury decides against him also, he may then appeal to the Circuit Court, and there elect to submit the matter a third time, either to the court, or to another jury; and this finding is conclusive, whether by the court or a jury. It is not possible, therefore, to reach this court by appeal, in a bankrupt case. This is clear; and my brethren think it equally clear, that no adjourned question can be brought here by a division of opinion: it follows, this court has no revising power over the numerous and conflicting constructions of the bankrupt law. In some circuits it is held, that one indebted "in consequence of a defalcation as a public officer; or as executor, or administrator, guardian, or trustee; or while acting in any other fiduciary capacity," can be discharged from all his other debts; and that the less favoured creditors may take all his property, unless the government, ward, &c., see proper to come in for distribution; when the fiduciary claim will also be extinguished. In other circuits, those indebted to any amount in a fiduciary capacity are all excluded as a class: the fact appearing on the face of the petition, it is dismissed of course. Such is the construction of the act in the eighth circuit; it has excluded from applying great numbers in the eighth and other circuits, who would have been admitted had they applied in circuits where the law is construed otherwise. This question also has been brought here by a division of opinion from the district of Kentucky, at the instance of the district and circuit judges, acting together as the Circuit Court; the question having been adjourned into that court by the district judge.

In the case of William Nelson, the question occurred in the same court, whether the bankrupt law was unconstitutional and void, or otherwise. It was adjourned, as already stated, into the

Circuit Court by the district judge; and there the judges were opposed in opinion, and certified the question to this court for its decision. This was done at the instance of the bar of St. Louis; the district judge of Missouri having pronounced the bankrupt act a mere insolvent law; such as was never contemplated by the framers of the Constitution, and therefore void. The following are some of his reasons for entertaining this opinion:

"Is this act of Congress, under which the petitioner claims a discharge from his debts, authorized by the Constitution? In order to determine this, it will be necessary to notice several of its provisions.

"It provides, in substance, that any person, whether a trader or not, who is indebted, except in a few enumerated cases, may file his petition in the District Court of the United States, for the benefit of the act, at any time he may please, without the consent or action of any of his creditors, and obtain by a decree of the court, a discharge from all his debts. This decree is to be had without the consent of any of his creditors being required, even if they do not participate in the proceedings or receive a dividend from the property. The decree is to be deemed a full and complete discharge from all his debts, contracts, and engagements, proveable under the act, whether contracted before or after the passage of the act. If he has property, he surrenders it; if he has none, it is the same thing as it regards his discharge.

"In examining this question, we should ascertain, if possible, what was the object the convention had in view by inserting the provision. The phraseology adopted would indicate a part of the object: 'To establish uniform laws on the subject of bankruptcies throughout the United States.' It was apprehended, at least, that they would not be uniform, unless Congress had the power to make them so. In addition to this, we are told by Mr. Madison (Fed. No. 42) that 'the power of establishing uniform laws of bankruptcy, is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different states, that the expediency of it seems not likely to be drawn into question.' To have a system that would be uniform and would prevent frauds, &c., seems to have been the object. The proposition was

referred to the committee of detail, of which Mr. Rutledge was chairman, and reported as it now stands in the Constitution. In ascertaining what were the mischiefs to be remedied or the objects to be effected, the convention, doubtless, looked to the condition of things, and of course to the institutions and laws of the various states. But for a definition of that or any other legal term, or to ascertain the nature and extent of the powers they were about to grant, by particular words or phrases, they would hardly look to the laws of the states. There was far less intercourse in those days than at present. There were no steamboats, railroads, or Macadamized roads.

"The laws of the several states could not have been generally known to the members of the convention from the different states; even the best lawyers could not have been acquainted with the laws of the states in which they did not practise. They are not so, even at this day. If they had been acquainted with the laws of all the states, to which would they have referred in preference to all the rest, for definitions, or the meaning and extent of legal terms? The convention well knew it was making a Constitution for the whole Union; that the terms they might use should be known and understood, and must be interpreted and explained in every state. They were, therefore, exceedingly exact in the use of words and phrases: every word of legal import, every phrase was weighed and considered; and a phrase of only a few words was frequently referred to a committee, as was done in this case, and examined and reported on. They were frequently obliged to use legal terms; they were making a law; this was a legal term—bankrupt laws: what was to be done to prevent confusion and uncertainty? and, above all, to mark exactly and with legal precision the extent of the powers they were about to grant, that neither more nor less power might be granted than was desired?

"Our ancestors had removed from England; the United States had then lately been English colonies and part of the British empire. The English laws and system of jurisprudence had been substantially adopted in every state in the Union. Every person at all conversant with legal subjects, and every lawyer of course, was acquainted with the English laws. This know-

ledge was equally extensive in every state. It is so to this day. Here, then, was a law with which all were acquainted, and to which all could refer. There could be no mistake, if reference was made to it for the meaning of terms. And to it they did accordingly refer. We do so to this day. Ask a lawyer the meaning of a legal term, and where does he look for an answer? To the statutes of Massachusetts or Georgia—New York, Pennsylvania, or Virginia? Certainly not. In most instances he would look in vain.

"The proposition in regard to bankruptcies was made by Mr. Charles Pinkney, of South Carolina, in the words we now find in the Constitution. It was referred to the committee of detail, consisting of Mr. Rutledge of South Carolina, Mr. Randolph of Virginia, Mr. Gorham of Massachusetts, Mr. Ellsworth of Connecticut, and Mr. Wilson of Pennsylvania; and they reported it in the words in which it was referred. Now, several of these states never had any thing like a bankrupt law. To which then did they refer, or could they refer, to ascertain the meaning and extent of the terms they were employing? The lawyer, if he is not familiar with the term, will refer to Blackstone's Commentaries, or to an English Law Dictionary, where he will readily find it. If he referred to the statutes of the different states, he might get as many definitions as there were states, supposing they had any law on the subject.

"The first Continental Congress, in 1774, declared, among other things, 'that the respective colonies were entitled to the benefit of such of the English statutes as existed at the time of their colonization, and which they had, by experience, found to be applicable to their several local and other circumstances.' 1 Journal of Congress, 28, Phila. ed. of 1800.

"Many of the states had adopted, in a body, the English statutes, only excepting such as were local to that kingdom, or not applicable to their situation.

"The Supreme Court of the United States, in Patterson v. Winn, 5 Peters, 233, say, that 'the English statutes passed before the emigration of our ancestors, and applicable to our situation, and in amendment of the law, constituted a part of the common law of the country.'

"We know, as matter of history, that the members of the con-

vention who took part in debate, were intimately acquainted with the English laws. The committee above mentioned possessed several of the most eminent lawyers in America, and who have held the highest legal stations. Reference was often made by them to the English laws for the meaning of terms or phrases they were using. Thus, when it was proposed to define and limit treason against the United States, Mr. Randolph and Mr. Ellsworth, (two of the committee,) Mr. Madison, Mr. Mason, and Mr. Gouverneur Morris, all referred to the act of Parliament of 25th Edward 3d; and the convention, at last, adopted the precise phraseology of that act. Madison Papers, 1770. Again, when the phrase '*ex post facto*' was under consideration, Mr. Dickerson stated that, on examining Blackstone's Commentaries, he found the term related to criminal cases only. Mad. Pap. 1450. And the Supreme Court has since confirmed the signification of the terms to the definition given by Blackstone. Mr. Hamilton, who was a member of the convention, in speaking of the '*Habeas Corpus*' provision in the Constitution, refers to, and quotes, Blackstone's Commentaries. Fed. No. 84.

This general principle being established, we may go a step further, and show that, in point of fact, the convention had the English statutes in view, in determining the nature and extent of the power they were granting to Congress, when the bankrupt clause was under consideration.

"Mr. Sherman observed 'that bankruptcies were, in some cases punishable with death by the laws of England, and he did not choose to grant a power, by which that might be done here.' 3 Mad. Pap. 1481. It thus appears, that the law of England were the laws referred to in regard to the definition and nature of the powers they were conferring.

"It may also be remarked, that Blackstone's Commentaries were in the hands of the members, and frequently referred to. This book contained a definition of a bankrupt, and a summary of the English laws on the subject. What then was the English law to which the convention referred when they adopted the clause in regard to bankrupts? The English system, when the convention sat, had been in operation for several generations; and provided, in substance, a proceeding by a creditor against a debtor, who was a trader; distribution of bankrupt's effects

equally among his creditors; a discharge to be obtained by the debtor from his debts, upon obtaining the consent of a given majority of his creditors.

"It was a proceeding for the benefit of creditors, as are all laws for the collection of debts, of which this was one; but with liberality towards the debtor, who, by misfortunes so frequently attending trade, became unable to pay his debts, in allowing him a discharge from those debts, upon obtaining the consent thereto of a given majority of his creditors. Even this provision for a discharge, we are told by Blackstone, was intended for the benefit of creditors, as it influenced debtors to act with economy, industry, and honesty, and make a full surrender of their property, without which they could not hope to obtain the consent of their creditors.

"The whole system was founded on the principle, that a trader, who owed debts in various parts of the country, and was fraudulently making way with his property, instead of paying his debts with it, should have that property taken away and placed in the hands of trustees or other officers, with which his debts should be paid, and each of his creditors, whether absent or present, have his fair dividend.

"We are told by Mr. Madison, who has, not inaptly, been called the Father of the Constitution, that a uniform system of bankruptcy 'would prevent so many frauds, when the parties, or their property, may lie or be removed into different states, that the expediency of it seems not likely to be drawn in question.' Fed. No. 42. This reason for the adoption of the clause in regard to bankrupts was published by Mr. Madison after the Constitution was proposed by the convention, but before it was adopted by the states; was intended to explain the grant of power to Congress, and to induce the states to accept the Constitution; and no doubt had its effect. The frauds of whom—the removal of whose property, are here spoken of? Certainly the frauds of the debtor—the property of the debtor.

"We have another almost contemporaneous exposition of this grant of power to Congress. It is the act of Congress of 1800, 'To establish a uniform system of bankruptcy throughout the United States.' It is altogether, in its principle and material features, like the English system; a proceeding by creditors against debtors who are traders; distribution of bankrupt's effects

equally among creditors; a discharge of the bankrupt from his debts, on the consent obtained of a given majority of his creditors.

"I have now, I think, shown that the bankrupt system intended by the framers of the Constitution, and to establish which, power was given to Congress, was a system for the benefit of creditors, to enable them to collect their just debts, and to prevent the frauds of debtors who might remove their property and themselves into different states.

"I will now show that the act we are considering is solely and entirely for the benefit of debtors, and to enable them to avoid their debts; and therefore opposed to the whole intent, spirit, and object of a bankrupt law. For this purpose I will here further notice some of its provisions.

"1. The debtor selects his own time to commence proceedings—when he may have entirely squandered his property, and when nothing can be found. It is not even necessary that he should have been sued, or threatened with a suit, or ever asked for the debt.

"2. He is allowed to select the state and county where he will commence proceedings. For this purpose he can change his residence or business to any place he may think most favourable. He can thus go where nobody is likely to detect his frauds.

"3. He may have spent all his property in idleness, riotous living, debauchery, or gambling, in stocks, or wild speculations: it will not affect him; and he is entitled to his discharge, equally with the most prudent, industrious, and economical person.

"4. If he does not surrender to his creditors one cent's worth of property, he may have property reserved to him, to the amount of $300, for his own use; and also his wearing apparel, and that of his family, which has been held, by some, to include jewelry.

"5. If a majority of his creditors should object to his discharge, it will only give him an additional privilege—that of demanding a jury, and taking the cause away from the court. Or he may appeal, even before the cause is tried, and is allowed ten days to appeal in. No such privileges are given to creditors.

"6. After the court disposes of the matter, or decides the cause against him, and refuses the discharge, he can then have it referred to a jury, although already tried and decided by the court,

which, heretofore, has never been allowed in any case, either in law or equity. The creditor is allowed no such privilege.

"7. In such cases, no provision is made by the act to allow the creditors a trial by jury.

"8. An appeal is given to the debtor—none is allowed by the act to a creditor.

"9. When the cause is removed into the appellate court, the debtor can demand either a trial by jury or a trial by the court. The creditor has no such privilege.

"10. The debtor may take the chance of a decision in his favour by the court; if in his favour, it will be conclusive. If the court decides against him, then he may demand a jury, and have another chance. If the court decides against him, he can have another chance by appeal. In the appellate court, if he thinks the court is likely, from previous decision, to be against him, he can take the chance of a jury. If he thinks the jury is likely to be against him, he can take his chance with the court. If some of these chances do not hit, there is no 'uncertainty in the law.' The creditor has no choice; any decision against him is to be final, and scarcely any in his favour is allowed to be final or conclusive.

"11. The English bankrupt law and the act of 1800 gave the appointment of the assignee to the creditors, because they alone were interested. No such privilege is given by this act.

"12. The commissioner is to be appointed in the county where the bankrupt lives.

"13. There is no punishment for frauds.

"14. To conclude, the debtor is to get a discharge from all his debts, without the consent of any creditor. It applies to debts contracted before the passage of the act, and of which creditors could have had no idea at the time they gave the credit.

"May I not here inquire, whether it is fair to construe this grant of power, intended for the benefit of creditors, and to enable them to collect their just debts, so as to authorize the passage of a law solely for the benefit of debtors, and to enable them to avoid and discharge their debts?

"Again: a clause had been introduced into the Constitution, prohibiting the states from passing any law impairing the obligation of contracts, because, as was said by the members of the

convention, it was immoral, contrary to the first principles of justice, and a power that ought not to be exercised by any legislative body. Would the states have ratified the Constitution, and submitted to such a prohibition on themselves, for such reasons, if they had understood that Congress could, at its pleasure, under colour of bankrupt laws, authorize the abrogation of all contracts?"

Pursuant to the opinion, decrees were entered, dismissing the first cases presented for final discharges in the district of Missouri; and some twelve hundred more, depending in that court, will be dismissed, unless the decrees are reversed which have been entered. It was thought, by the circuit judge, due to the county at large, and to the parties concerned, that this important question should meet with the speedy decision of this court; and therefore it was brought here.

No law that Congress ever passed, has in it to a greater degree, the elements of various construction and confusion, than the bankrupt law of 1841, when administered by more than thirty judges, acting separately; if all are exempt from the revising power of this tribunal, created for the purpose (amongst others) of producing uniformity of decision and construction in all cases over which its jurisdiction extends.

I think Congress intended, by the 6th section of the bankrupt law, to give the district judge the power to adjourn questions into the Circuit Court, 1. For the purpose of obtaining the aid and assistance of the circuit judge; and, 2. To make up a division of opinion on great questions, so that the decision of the Supreme Court might be had. This was contemplated by Congress; or it was intended that in no bankrupt case should this court have a revising power, although in every district in the United States the law might be differently construed: and the wildest prediction could hardly have exceeded the reality. So far from being "a uniform system of bankruptcy," in its administration, it has become, by the various and conflicting constructions put upon it, little more uniform than the different and conflicting state insolvent laws. This result could not have escaped those who passed the law; it was too prominently manifest to be overlooked; I cannot, therefore, bring my mind to the belief that the revising power of this court was intended to be cut off. And, as the most expeditious and convenient mode of revision was by

a division of opinion, I think Congress intended that should be the mode. Notwithstanding the question was sent to this court, the case might progress below at the election of the district court; so the recited act of 1802 provides; and then the creditor and debtor would have equal opportunities to redress a perverted construction. But, as the matter now stands, the remedy is with Congress, either to give this court jurisdiction, or to withhold it.

ORDER:

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the district of Kentucky, and on the points and questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that this cause be and the same is hereby dismissed, for the want of jurisdiction, and that this cause be and the same is hereby remanded to the said Circuit Court, for such proceedings to be had therein as to law and justice may appertain.

While this volume was in press, we received the following opinion delivered by Judge Catron in his judicial district, which we insert as being of general interest.

IN THE MATTER OF EDWARD KLEIN.

This is an appeal from the District Court of Missouri, in a case of bankruptcy, on the voluntary petition of the appellant, to be discharged from his debts, on the surrender of his property, according to the act of Congress of 1841. The proceeding being in all respects regular, the petitioner moved for his discharge: the District Court refused to grant such motion, "because it considered the act of Congress under which said Klein asked to be discharged from all his debts, as being against the Constitution of the United States, and therefore the court had no power to grant such discharge."

The ground of this judgment the Circuit Court is called upon to revise. I am relieved from setting forth at any length the opinion of the district judge, because this has been already done, in an opinion delivered by me in the Supreme Court of the United States at its last term, when an attempt was made to bring the present question before that court to have it decided for the purposes of this case.

By the Constitution, Congress is vested with power "to establish uniform laws on the subject of bankruptcies throughout the United States." The district judge was of opinion, that the extent of the power is limited to the principle on which the English bankrupt system was founded; and to that system

the convention referred, when it adopted the clause above recited, for its definition. That system provided, a proceeding by a creditor against a debtor who was a trader; a distribution of a bankrupt's effects equally among his creditors; and a discharge of the debtor from his contracts upon obtaining the consent of a given majority of his creditors. That it was a proceeding for the benefit of creditors; the whole system being founded on the principle that a trader who owed debts in various parts of the country, and was fraudulently making away with his property, instead of paying his debts with it, should have the property taken away and placed in the hands of trustees or other officers, with which his debts should be paid; and each of his creditors, whether present or absent, have his fair dividend; and that the bankrupt law of 1800, is a fair exposition of the constitutional provision.

Briefly: That a bankrupt law, was one, by which honest creditors could force fraudulent debtors, who were traders, to surrender all their property, to pay rateably all their just debts: but that a law made solely and entirely for the benefit of debtors, and which enabled them at their own election, to avoid their debts, was opposed to the whole intent, spirit, and object of a bankrupt law.

I state thus much of the grounds on which my brother judge's decree was founded from his printed opinion, because this case has not been argued on part of the creditors; for whom no counsel appeared in this court, nor did there in the court below, as I am informed. The accuracy, industry, and unquestioned ability of the district judge, have, I do not doubt, brought forward the best reasons that exist, in support of the judgment he gave. The tenor, and true spirit, of the English bankrupt laws, such as they were when our Federal Constitution was adopted, he has given; and I agree with him, that the act of 1841, in so far as it permitted the debtor at his own sole election, to come into court and coerce an extinction of his debts, and abrogation of his contracts, contrary to the will of his creditors, was in violation of the leading principles on which the English laws were founded. Our law contemplated a proceeding by a debtor against his creditors; provided the debtor was insolvent: by the English law, the creditor alone could originate the proceeding; and it mattered not, whether the defendant was insolvent or otherwise; if he did the fraudulent act, it made him a bankrupt—a fraudulent trader. Then by the English laws, "a fraudulent trader" could only be a bankrupt; with him as debtor; and with his creditors, could courts deal; and this at the election of the creditors—the debtor, having no election to ask for distribution or for a discharge from his debts. If the power conferred on Congress, carries with it these restrictions, then the District Court properly refused to discharge the applicant Klein, because the act of Congress was unconstitutional in his case. But other and controlling considerations enter into the construction of the power: it is general and unlimited, it gives the unrestricted authority to Congress over the entire subject, as the Parliament of Great Britain had it; and as the sovereign states of this Union had it before the time when the Constitution was adopted. To go no further: what was the power of the states on the subject of bankruptcies? They could, and constantly did, permit the debtor to come involuntarily and surrender his property, and ask a discharge from his debts; the property was distributed generally among the creditors, and the debts of the petitioner an-

nulled. Nor does the Constitution prohibit the states from passing such laws; New York, Pennsylvania, Louisiana, and others, now have them in full operation. The insolvent laws of Pennsylvania are in substance, and to a great extent in detail, similar to the act of Congress of 1841; and no doubt furnished some of the ideas that were incorporated into the act. That Pennsylvania had power to pass these laws, no one ever doubted, so far as she was not restricted by the Constitution of the United States. The Supreme Court held, in the case of Ogden v. Saunders, 12 Wheat. 213, that the states retained the power and could exercise it by law, and that the law would operate to discharge the contract between debtor and creditor; they being inhabitants of the particular state at the date of the proceeding, if the contract had been made there after passing the law. In such case the parties contracted subject to the law, and it entered into the contract. The case of Boyle v. Zacharie and Turner, 6 Peters, 635, settled the contested question of power; and that it remained with the states to this limited extent. But the restrictions depend on general principles of international law, and other parts of the Constitution; especially that, which prohibits the states from passing any law impairing the obligations of contracts; as will be seen by reference to the leading case on the subject, of Sturges v. Crowninshield, 4 Wheat. 122. What the states might do before the adoption of the Constitution, may well be ascertained, from what they now do in virtue of their respective powers. They may frame a bankrupt law in any form they see proper; this has never been questioned so far as my knowledge extends. The controversies in the Supreme Court turned on the question, whether the Constitution inhibited the states (there being no acts of Congress opposed to it) from legislating on the subject of bankruptcies; or, whether the power was exclusive in Congress. In the state tribunals the debtor comes involuntarily, and forces the creditor to prove his debt or be barred. One not a trader may apply: neither is the consent of the creditors (or any portion of them) necessary to authorize a discharge from the contracts of the debtor. So he may have no property to divide, and many debts to annul, from which he seeks a discharge, and from which he is discharged. These powers clearly belonged to the state governments, before Congress was invested with them; and this was done without limitation.

The District Court relied confidently on the ground, that Congress can pass no law violating contracts; and that the clause of the Constitution conferred no such authority, because the English bankrupt laws, by which the power is supposed to be restricted, only permitted the contract to be annulled at the election of four parts in five of the creditors in number and value; and therefore they annulled it by a new contract. This argument proceeds on the assumption, that a proceeding in bankruptcy can only be had, at the election of, and for the benefit of creditors; and that every material step, is their joint act; to which the debtor is compelled to submit. For the present it will only be necessary to say, that one prominent reason, why the power is given to Congress, was to secure to the people of the United States, as one people, a uniform law, by which a debtor might be discharged from the obligation of his contracts; and his future acquisitions exempted from his previous engagements: that the rights of debtor and creditor, equally entered into the mind of the framers of the

Constitution. The great object was to deprive the states of the dangerous power to abolish debts. Few provisions in the Constitution have had more beneficial consequences than this; and the kindred inhibition on the states, that they should pass no law impairing the obligation of contracts.

The inhabitants of states producing largely, must be creditors; the inhabitants of those that are consumers, will be debtors; bankrupt laws of the latter states might ruin the producers and creditors; they having no interest or power in the government of the consuming states, and it being the interest of the latter to annul the debts of non-residents, no remedy would exist for the grossest oppression. No laws of relief would be more effectual in times of pressure by foreign creditors; nor more likely to be adopted. If one state adopted such a measure, it would furnish a fair occasion for others to do the same, on the plausible pretext of self-defence; others would be forced into a similar bad policy, until discredit and ruin would overspread the entire land, by an extinction of all debts; and a consequent prostration of morals, public and private, on the subject of contracts. This evil had to a certain extent occurred, and was fresh in the minds of the framers of the Constitution; and no doubt it would again occur in some of the states, but for the provisions under consideration standing in the way, of abrogating the private contracts of non-residents.

But if Congress passed the law, it must be uniform throughout the United States, then the entire people are equally represented, and have the power to protect themselves against hasty and mistaken legislation, by its repeal, if found oppressive in practice.

Legislation by Congress on the subject of bankrupteies, is of much less consequence, than its prohibition on part of the states. They can pass no law affecting a non-resident, because no jurisdiction exists of his person; they can impair no contract made out of the state, because it was not made subject to the state insolvent law. The power, as it stands restricted by the decision in Ogden v. Saunders, is almost harmless; those whom the state bankrupt law can most affect, have the popular vote in the state legislature, and may repeal the law; the foreigner has little interest in its existence, as he cannot be affected by it, further than that the debtor may be deprived of his property. Another reason why Congress was vested with the power, was to prevent dangerous conflicts of jurisdiction among the states. A discharge in one sovereignty from contracts, is by the laws of nations not recognised as a discharge in another sovereignty, save on the grounds of comity; an assignee under the British bankrupt laws, is not recognised in this country as owner of the debts of the bankrupt; and an attaching creditor, or the government may disregard a title set up by the foreign assignee. Harrison v. Sterry, 5 Cranch, 298. The states in this respect are foreign to each other, and would be little likely to extend comity to the discharge of each others; from which great confusion might follow, and much ill will.

In considering the question before me, I have not pretended to give a definition; (but purposely avoided any attempt to define) the mere word, BANKRUPTCY. It is employed in the Constitution in the plural, and as part of an expression; "the subject of bankruptcies." The ideas attached to the word in this connection, are numerous and complicated; they form a subject, of exten-

sive and complicated legislation; of this subject, Congress has general jurisdiction; and the true inquiry is—To what limits is that jurisdiction restricted?

I hold, it extends to all cases where the law causes to be distributed, the property of the debtor among his creditors: this is its least limit. Its greatest, is a discharge of the debtor from his contracts. And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject —distribution and discharge—are in the competency and discretion of Congress.

With the policy of a law, letting in all classes, others as well as traders; and permitting the bankrupt to come in voluntarily, and be discharged without the consent of his creditors, the courts have no concern; it belongs to the lawmakers.

I have spoken of state bankrupt laws. I deem every state law, a bankrupt law, in substance and fact, that causes to be distributed by a tribunal, the property of a debtor among his creditors; and it is especially such, if it causes the debtor to be discharged from his contracts, within the limits prescribed by the case of Ogden *v.* Saunders. Such a law may be denominated an insolvent law; still it deals directly with the subject of bankruptcies, and is a bankrupt law, in the sense of the Constitution; and if Congress should pass a similar law, it would suspend the state law, while the act of Congress continued in force.

This court deeming the act of 1841, constitutional, it is ordered, that the decree of the District Court dismissing the proceeding be reversed, and the petitioner, Klein, be discharged from his debts, and receive his certificate. The same order is directed in the case of Christopher Rhodes; dismissed also on constitutional grounds by the District Court.

CHARLES W. CASTLEMAN, A PETITIONER IN BANKRUPTCY.

(This case is similar to that of Nelson.)

ORDER.

THIS cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the district of Kentucky, and on the points and questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that this cause be and the same is hereby remanded to the said Circuit Court, for such proceedings to be had therein as to law and justice may appertain.

JOEL COLLINS, A PETITIONER IN BANKRUPTCY, *v.* JAMES BLYTH, AN OPPOSING CREDITOR.

(This case is similar to that of Nelson.)

ORDER.

THIS cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the district of Kentucky, and on the points and questions on which the judges of the said Circuit Court were opposed in opinion, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that this cause be and the same is hereby dismissed for the want of jurisdiction, and that this cause be and the same is hereby remanded to the said Circuit Court, for such proceedings to be had therein as to law and justice may appertain.

WILLIAM TAYLOR AND OTHERS, APPELLANTS, *v.* GEORGE M. SAVAGE, EXECUTOR OF SAMUEL SAVAGE, DECEASED, DEFENDANT.

Where a decree is passed by the court below against an executor, being the defendant in a chancery suit, and before an appeal is prayed the executor is removed by a court of competent jurisdiction, and an administrator *de bonis non* with the will annexed, is appointed, all further proceedings, either by execution or appeal, are irregular, until the administrator be made a party to the suit.

If an execution be issued before the proper parties are thus made, it is unauthorized and void; and no right of property will pass by a sale under it.

The administrator cannot obtain redress by application to this court, but must first be made a party in the court below. This may be done at the instance of either side.

After he is thus made a party, he may stay proceedings by giving bond, or the complainants may enforce the decree, if the bond be not filed in time.

It is not clear that a complainant who has appealed from a decree in his favour, in the hope of obtaining a larger sum, can, pending the appeal, issue execution upon the decree of the court below.

Morehead, of counsel for the appellee, moved the court for leave to give an appeal bond in this case, which shall operate as a *supersedeas*, and for leave to docket the cross-appeal, and for such relief as may meet the case.

He stated that Taylor had obtained a decree against Savage, executor of Savage, in the court below, for $5000 and upwards; that the decree was actually rendered on the 29th day of November, 1842, but was entered as of the day before; that the complainant had appealed from this decree, and sent the record up to this court, where the case is now pending; that an appeal was also prayed and allowed on the part of the defendants; that this last-mentioned appeal was not carried out, because, on the 28th day of November, the date of the decree, the Orphan's Court of Lauderdale county, in Alabama, removed Savage from his executorship, and appointed Vincent M. Benham administrator *de bonis non* with the will annexed; that, of course, Savage could not give bond to prosecute the appeal which had been allowed him, and Benham lived at a distance from the court when the decree was rendered, and was ignorant of the said decree, and of the change made in the representative of the estate; that the complainants, notwithstanding their appeal, had taken out execution, which had been levied upon the property of the deceased, and a sale was about to take place; that among the subjects of said levy were some family negroes, who had been for several generations in the family, whom it would be especially painful to part with; that the complainants resided in Scotland and other foreign countries, so that there would be no chance to recover back the money, if the decree of the court below should be reversed.

Under these circumstances he moved for leave to docket the cross appeal, upon giving security, and for an order to quash the execution irregularly issued; and filed affidavits setting forth the facts stated above. He stated that he had not been able to find a precedent bearing upon the case, but argued to show that the petitioner was entitled to relief.

Crittenden, contrà.

If no precedent can be found, it is a strong argument against the motion. Distance of the residence of the complainants is no reason for relief, because one of the parties in every suit must be the inhabitant of another state. The execution is not here; nothing but an affidavit. The petitioner has other means of relief than by coming to this court. As to the hard-

ship of the case, twenty days were given below to file the bond. Why did not the party come in? It is said he lived at a distance. How far? When was he told of the decree? The papers are studiously ambiguous. The complainants are not all foreigners; one of them is a citizen of Pennsylvania, and now in court. There is no irregularity in the execution.

Sergeant, in reply, and for the petitioner.

If the papers are ambiguous, the other side could have had them cleared up, because they have been filed for some days.

This court has possession of the case by virtue of the appeal brought up on the other side. United States Court and Orphan's Court sat in different places, and neither knew what the other did. After appeal, the case was not in the court below, because it was removed here, and the whole case brought up. The wrong has been done to the court itself; the party has been brought here to defend the appeal, and then execution is issued against him. The only case like this is in 7 Cranch, 278. The execution is not noticed on the record at all, and must have issued after the record was made out.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case is brought before the court by the petition of Vincent M. Benham, administrator *de bonis non* with the will annexed of Samuel Savage.

It appears that a bill was filed by William Taylor and others, in the District Court of the United States for the northern district of Alabama, against George M. Savage, executor of Samuel Savage, deceased, to which the defendant appeared and answered. Testimony was taken on both sides, and at the final hearing on the 28th of November, 1842, the court decreed that the complainants recover of the respondent, as executor of Samuel Savage, $5212 92 and costs, to be levied of the goods and chattels, lands and tenements of the said Samuel Savage. On the same day the Orphan's Court of Lauderdale county, in the state of Alabama, having competent jurisdiction for that purpose, removed the said George M. Savage from his executorship, and appointed Vincent M. Benham, the petitioner above mentioned, administrator as aforesaid.

Huntsville, where the District Court of the United States held its session, and Florence, where the Orphan's Court of Lauderdale

county was in session, were distant from each other between seventy and eighty miles; and the new administrator, Vincent M. Benham, does not appear to have known of the decree until some days after it was passed. At the time of the decree Harvey Dillahunty was attending to the suit in chancery as the attorney in fact of George M. Savage, the respondent, and two days afterwards, that is to say, on the 30th of November, 1842, in the name of the respondent, prayed an appeal; and the District Court, with the consent of the complainants, passed an order giving the said George M. Savage liberty to file an appeal bond at any time within twenty days from the adjournment of the court. On the 2d of December, the complainants also appealed, and on the same day gave the usual bond to cover costs, which was duly approved; and the transcript of the record and proceedings had in the cause in the District Court have been transmitted to and docketed in this court in the names of the said William Taylor and others, complainants and appellants, against the said George M. Savage, executor of Samuel Savage, respondent and appellee.

The executor having been removed as aforesaid, no bond was executed by him nor by Vincent M. Benham, the administrator, within the time limited by the court; and therefore an execution was issued by the clerk of the District Court against the property of Samuel Savage, by virtue of which the marshal has seized the property of the said deceased, and is about to sell the same in order to satisfy the decree.

In this state of the proceedings, Benham, the administrator, has filed his petition at the present term, setting forth the facts as above mentioned, and offering to file a transcript of the proceedings on his part and to give security on his appeal, and praying that his bond may be approved by this court, and the execution issued by the complainants superseded until the appeal can be heard and decided in this court. Affidavits have been filed on both sides, but there is no conflict between them in any circumstance deemed material by the court; nor do they vary in any important particular from the statement contained in the petition.

We are by no means prepared to say that a complainant, after having appealed from a decree in his favour, can be permitted, pending the appeal, to carry into execution the decree which he is seeking to reverse in the appellate court, in order to obtain a

decree for a larger sum. But the relief asked for by the petition cannot be granted, because there is no case legally in this court upon the appeal of either party, upon which process can be issued The decree in the Circuit Court is against George M. Savage, executor of the last will and testament of Samuel Savage deceased. There was no other party respondent in the District Court, and the decree was passed against him in his representative character. Before the appeal was prayed on either side, he had ceased to be the representative of the estate of Samuel Savage, and had no control over it, nor any right to interfere with it by prosecuting or appearing to an appeal, or in any other manner. By his removal from the office of executor, he was as completely separated from the business of the estate as if he had been dead, and had no right to appear in or be a party in this or any other court, to a suit which the law confided to the representative of the deceased. No further proceedings, therefore, could be had on the decree in the District Court, until Benham, the administrator *de bonis non*, was made a party.

In this view of the subject, it follows, 1. That the appeal of the complainants is not regularly before this court, and the irregularity cannot be cured here unless the administrator voluntarily appears to it. The case may, however, upon the application of the appellants, be remanded to the District Court with leave to make the proper parties.

2. The execution issued on the decree was unauthorized and void, and no right of property will pass by a sale under it, if one should be made by the marshal.

3. The appeal of Benham, the administrator *de bonis non*, is also irregular; and the case cannot be brought here by him unless he is first made a party in the District Court.

But he may be made a party there, either upon his own application or that of the complainants, according to the rules and practice in chancery proceedings. And when this has been done, the administrator may take an appeal; and upon giving bond within the time prescribed by law, all proceedings upon the decree will be stayed in the District Court, until the decision of this court shall be had in the premises. And if he fail to give the bond within the limited period, the complainants will then be entitled to process from the District Court, in order to enforce it. As the

case now stands, there is no suit here upon which this court can found any process to set aside the execution improperly issued, and the petition of Benham, the administrator, must be dismissed.

ORDER.

On consideration of the petition of Vincent M. Benham, filed in this case, and of the arguments of counsel thereupon had, it is now here ordered by this court that the said petition be and the same is hereby dismissed.

WILLIAM J. MINOR AND CATHERINE HIS WIFE, PLAINTIFFS IN ERROR, v. SHUBAL TILLOTSON.

Whether or not a record contains a bill of exceptions or statement of facts by the court, according to the practice in Louisiana, by which any question of law is brought up for revision in such a form as to enable this court to decide upon it; and whether or not there is a mass of various and conflicting testimony in relation to facts, upon which no jurisdiction can be exercised upon a writ of error; are questions to be decided only upon the final hearing of the cause.

The court will not go into this inquiry upon a motion to dismiss the writ of error, before the cause is taken up for argument.

Webster, of counsel for the defendant, moved to dismiss the writ of error in this case, for the following reasons:

1. Because this court has no jurisdiction on writs of error of any question apparent in this record.

2. Because the record does not show any question of law to have been decided in the court below, which this court can revise.

3. Because there is no question of law stated on the record by bill of exception; nor any special verdict, or agreed state of facts, or any unquestioned evidence of facts, on which any question of law can arise.

4. Because it does not appear whether any, or, if any, what matter of law was in dispute between the parties.

The action was brought to recover certain tracts of land. Two trials had been had; the verdict rendered on the first had been set aside by the court, and the judgment rendered on the second verdict reversed by this court.

Another jury was empannelled to try the cause, June 11, 1839; and after the trial had proceeded for some time, the parties agreed that the whole case should be submitted to the court, on the facts and the law, and that the judge should state the facts as he should find them; that such statement might be regarded as a special verdict.

On the 10th April, 1840, the court rendered a general judgment for the defendant, without making any statement of facts whatever. And thereupon, the next day, April 11, 1840, the parties agreed that all documents, plans, depositions, evidence, and exhibits, read in the cause, should be taken for a statement of facts in the case. The whole mass, therefore, of various and conflicting evidence, mixed up with questions of law, if there be such questions, is submitted to the decision of the judges of this court. This is a form of exercising its appellate jurisdiction on writs of error which it is not supposed to be competent to this court to adopt. 2 Wheat. 363; 3 Peters, 410; 16 Peters, 169.

Walker opposed the motion, and contended that there were three questions of law in the case, and that the statement of the judge was adopted, by agreement, as a special verdict.

Mr. Chief Justice TANEY delivered the opinion of the court.

This is a writ of error from the Circuit Court of the United States for the eastern district of Louisiana.

A motion has been made to dismiss the writ, upon the ground that the record contains no bill of exception, nor statement of facts by the court, according to the practice in Louisiana, by which any question of law is brought up for revision in such a form as to enable this court to decide upon it; and that there is a mass of various and conflicting testimony in relation to facts, upon which no jurisdiction can be exercised upon a writ of error.

Assuming this statement to be correct, it does not follow that advantage can be taken of it upon a motion to dismiss. The record shows that a judgment was rendered in the Circuit Court, over which this court undoubtedly have jurisdiction upon a writ of error. The plaintiffs allege that there is error in law in this judgment, and have brought it here for the revision of this court. And upon the argument of the case it will be incumbent upon

them to show that the record presents, in some form or other, a statement of facts upon which a question of law arose in the Circuit Court, and which was there erroneously decided. And if he fails to do this, the judgment must be affirmed. But he is entitled to be heard, in order that he may show, if he can, that the error of which he complains appears in the record; and whether it does so appear or not, is a matter which cannot be inquired into in the form in which the case is now brought before us.

The motion must therefore be dismissed.

ORDER.

On consideration of the motion made in this cause on a prior day of the present term of this court, to wit, on Saturday, the 18th ult., by Mr. Webster, to dismiss this writ of error for the want of jurisdiction, and of the arguments of counsel thereupon had, as well in support of as against the said motion, it is thereupon now here considered and ordered by this court, that the said motion be and the same is hereby dismissed.

JAMES TODD, APPELLANT, *v.* OTIS DANIELL, DEFENDANT.

AN agreement in writing between the counsel, as well for the appellant as for the appellee, that the decree of the Circuit Court in this case shall be affirmed with legal damages and costs for the said Daniell, having been filed; it is thereupon considered and decreed by this court, that the decree of the said Circuit Court in this cause be and the same is hereby affirmed, with costs and damages, at the rate of 6 per centum per annum; and also that the said appellee recover of the said appellant, the further sum of $125 for the costs of the transcript of the record in the Circuit Court according to the said agreement.

JAMES WILLIAMS, PLAINTIFF IN ERROR, *v.* THE UNITED STATES, DEFENDANTS IN ERROR.

The act of Congress passed January 31st, 1823, prohibiting the advance of public money in any case whatsoever to the disbursing officers of government, except under the special direction of the President, does not require the personal and ministerial performance of this duty, to be exercised in every instance by the President under his own hand.

Such a practice, if it were possible, would absorb the duties of the various departments of the government in the personal action of the one chief executive officer, and be fraught with mischief to the public service.

The President's duty, in general, requires his superintendence of the administration, yet he cannot be required to become the administrative officer of every department and bureau, or to perform in person the numerous details incident to services, which, nevertheless, he is, in a correct sense, by the Constitution and laws required and expected to perform.

It is legal evidence that the President specially authorized and directed, in writing, the secretary of the Treasury to make such advances, and that such paper was destroyed, when the Treasury building was burned. It is sufficient if the witness states his belief that it was so destroyed. The case in 9 Wheat. 486, examined and confirmed.

The dockets and records of a court, showing that money had been received by the marshal or his deputies, under executions, are good evidence in a suit against his securities. The acts of the court must, in the first instance, be presumed to be regular, and in conformity with settled usage; and are conclusive until reversed by a competent authority.

THIS case came up by writ of error from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Washington.

The facts were these:

On the 4th of February, 1831, Henry Ashton was appointed marshal of the District of Columbia, and on the 7th executed a bond for the faithful performance of the duties, by himself and his deputies. There were several securities, among whom was James Williams, the plaintiff in error. He remained in office until the 28th of February, 1834.

In June, 1835, the United States brought suit upon the bond, to which there was a plea of performance. The replication assigned five breaches. 1. That he had neglected to return executions issued for fines and costs. 2. That he had discharged persons committed to his custody under execution. 3. That he had not accounted for fines paid. 4. That he had not accounted

for money advanced to him by the secretary of the Treasury under the special direction of the President of the United States; and, 5. That he had discharged persons from prison without authority of law. To this replication, there were a rejoinder and issues, and in 1839 the case was tried. The verdict of the jury was for the United States. The two bills of exception taken at the trial are set forth in the opinion of the court, and need not be repeated.

Bradley, for the plaintiff in error.

Legaré, attorney-general, for the United States.

Bradley made the following points:

1. The President of the United States holds a relation toward the secretary of the Treasury different from that which he holds toward the head of any other department.

2. No money can be drawn from the Treasury but in the manner and upon the vouchers designated by law.

3. Where a special discretion is given by positive law to the President to direct money appropriated by law to be paid out of the Treasury, it must be exercised by him alone, and cannot be delegated.

4. Where money is by law to be drawn from the Treasury by a special authority, different from the usual manner, that special authority must be deposited in the Treasury Department, and form part in the settlement of the Treasury account.

5. And: The Treasury transcript is not evidence *per se* to charge a surety with money so paid to his principal; but must be accompanied by a copy of the voucher on which such payment was made.

To support them, he argued that the United States were bound to show the exercise of the special power vested in the President. The Treasury transcript is not conclusive evidence that the money was drawn from the Treasury legally. 5 Peters, 292; 8 Peters, 375. Evidence of the contents of the order said to have been given by the President could not be received, as there was no proof of its loss. 2 Stark. Ev. 350. Court say, in 1 Peters, 596, that proof must be given of its loss, and that it was searched for. If the money was not placed with the marshal according to law, the United States cannot recover.

As to the second exception:

The declarations of the marshal do not bind the sureties; not evidence unless in the regular course of his business, and he had nothing to do with the docket. If an endorsement be made on the writ, it is his official act, but not otherwise. 3 Bro. and Bing. 132.

The act of Maryland, February, 1777, c. 13, sec. 2, provides for the recovery of common law fines by *fieri facias* or *ca. sa.*, but the act of 1797, c. 74, directs *capias ad satisfaciendum* to be issued for all fines. Here were *fi. fa.* for common law fines, which proceeding was contrary to law. The act of 1794, c. 54, provides remedies against the sheriff, and, of course, the marshal; judgment should have been entered up against him. No action on the bond until a judicial sentence of default 18 Johns. 391.

Legaré, for the United States.

If the President could not delegate this power, he could do little else but look at marshal's accounts. But this court have recognised the authority to delegate. Wilcox *v.* Jackson, 13 Peters; 10 Peters, 291; 1 Peters, 296.

As to the evidence: The court has allowed reasonable evidence to be given. 7 Peters, 99; 12 Peters, 3.

As to the Maryland practice:

The general rule is, that an admission of a deputy does not bind surety; but see 10 Barn. and Cres. 17, 317. In this case the party is dead, and it is his declaration against his own interest. But the acts of parties, part of the *res gesta*, are binding. 8 Wheat. 326; 3 Wash. C. C. R. 369. The confession of an under-sheriff evidence against the sheriff. 1 Lord Raym. 190. At common law, *fi. fa.* could issue for fines. 3 Coke, 12, b; 2 Just. 19. The act of Maryland was merely directory. Inventory of sheriff evidence between other parties. Buller's N. P. 249; 2 Campb. 379.

Bradley, in conclusion:

The act of 1809, c. 199, gives the President power to transfer appropriations; but no one supposes he can delegate this power to the secretary. In Kendall's case, 12 Peters, the court draw a

distinction between general and special powers. General rule is, that discretionary powers cannot be delegated.

Mr. Justice DANIEL delivered the opinion of the court.

This cause comes up on a writ of error to the Circuit Court of the United States for the District of Columbia.

The defendants in error instituted an action of debt in the Circuit Court against the plaintiff in error, as surety for Henry Ashton, deceased, late marshal of the District of Columbia, in a bond executed by Ashton, conditioned for the faithful performance of the duties of his office. On oyer of the bond, the defendant pleaded generally conditions performed by the marshal and his deputies; after this plea various breaches of the condition of the bond were specially assigned, charging the late marshal with failing to account for moneys advanced to him by the secretary of the Treasury, under special direction of the President of the United States; with not having accounted for and paid over moneys received by him and his deputies on executions, and with having failed to collect under executions which came to his hands, moneys that he ought to have collected from persons who were solvent. Issues were taken to the country upon the several breaches thus assigned, and the jury empannelled to try those issues, returned as their verdict in substance, that the said Henry Ashton, by himself and his deputies, did not well and faithfully perform and fulfil all the duties of his office of marshal of the district, in pursuance of the acts of Congress in such cases made and provided; and they found the sum of $8279 25 cents, with interest thereon from the 24th day of November, 1836, to be really and justly due to the United States on the marshal's bond. Upon this verdict the court gave a judgment for $20,000, the penalty of the bond, but to be discharged by the amount assessed by the jury, together with the costs of suit.

At the trial, and before the jurors withdrew from the bar, the defendant below tendered two bills of exceptions to the ruling of the court in the cause, which bills of exceptions are as follow:

Defendant's first bill of exceptions.—On the trial of this cause, the plaintiffs, to support the issues joined, on their part, offered to give in evidence the accounts settled between the United States

and Henry Ashton, late marshal of the District of Columbia, upon whose official bond this action is brought against the defendant, as one of the sureties therein named. By these accounts it appears, that a balance appears due from the said Ashton to the United States, of $6455 16. That in making up the said balance, various sums of money were, from time to time, during his continuance in office, advanced and paid to him, as marshal as aforesaid, out of the Treasury of the United States, by order of the secretary of the Treasury, before the said Ashton, as marshal, had rendered accounts or vouchers, showing that he had himself advanced and paid the same, or any part thereof, to those entitled by law to receive the same; and while balances for moneys previously advanced to him existed on the books of the department, and before it had been shown that the same had been properly applied and expended, and when the said sum of $6455 16, was not in fact due from the United States for any services rendered or money expended.

And the plaintiffs offered in evidence the statements of Asbury Dickins, formerly a clerk in the Treasury Department, and of McClintock Young, now chief clerk of said department; which, reserving all objections to the competency of such testimony, it was agreed should be received as if said parties had been sworn in the case, and had testified in accordance with said statements. To the admissibility of all which testimony the defendant objects, but the court overruled the objection, and the defendant, by his counsel, excepts; and the said evidence being thus admitted to go to the jury, the counsel for the plaintiffs prayed the court to instruct the jury, that upon this evidence the plaintiff was entitled to recover the said sum of $6445 16, against the defendant; and the court overruling the objection of the defendant thereto, gave said instruction, to which the defendant excepts; and the court, in pursuance of the statute, sign and seal this bill of exceptions to all the matters so ruled, as aforesaid, this 11th day of January, 1840.

W. CRANCH, [L. S.]
B. THRUSTON, [L. S.]
JAMES S. MORSELL. [L. S.]

Second bill of exceptions.—In the further trial of this cause, the plaintiffs produced the dockets and records of this court, showing that in a number of cases where judgment had been entered

against defendants for common law fines, forfeitures, and costs, adjudged against the said defendants, and the said defendants had paid the said amounts, so respectively adjudged against them, to the marshal, and entries were thereupon made by the said marshal or his deputy, on the dockets of said courts, "money made and ready," "money paid," and that the amounts so received by said marshal amounted to the sum of

And the plaintiffs further proved by the dockets, records, &c., as aforesaid, that certain sums of money were adjudged by the court aforesaid, against certain defendants, for common law fines, forfetures, and costs, upon which writs of *ca. sa.* were issued, which writs were returned by the marshal, "satisfied marshal," and showed that the said sums so received by said Ashton, amounted to

And the defendant objected to the said several amounts as being recoverable in this action against the said defendant, and prayed the court to instruct the jury that he was not liable therefor; but the court refused so to instruct the jury, and instructed them that the defendant was liable for the amounts so received by said Ashton.

To which refusal the defendant, by his counsel, excepts, and prays the court to sign and seal this bill of exceptions, which is done accordingly, this 11th dav of January, 1840.

W. CRANCH, [L. S.]
JAMES S. MORSELL. [L. S.]

The statements of Asbury Dickins and McClintock Young, referred to in the first bill of exceptions, are in the following words:

Washington, January 11, 1840.

DEAR SIR:—In compliance with your request, I now state, as I mentioned to you verbally, some time ago, that it is within my recollection that soon after the passing of the "act (of the 31st of January, 1823,) concerning the disbursement of public money," the secretary of the Treasury was specially authorized and directed in writing, by the President of the United States, to make such advances of money, from time to time, to various classes of the disbursing officers of the government, and among others to the marshals of the United States, as should be found necesary, to the faithful and prompt discharge of their respective duties, and

to the fulfilment of the public engagements. The papers containing these directions of the President were, as I believe, destroyed in the late burning of the Treasury building.

I am, dear sir, sincerely yours,

ASBURY DICKINS.

To *Francis S. Key, Esq., &c. &c. &c*

DEAR SIR:—In reply to your inquiry, I have to state, that all advances to marshals U. S. are made by the secretary of the Treasury, and not by direction of the accounting officers.

Yours resp'y,

11*th January*, 1840. McC. YOUNG.

F. S. Key, Esq.

The questions presented for consideration here upon the aforegoing bills of exceptions, and the proofs to which they refer are these: 1. Whether the sums of money placed in the hands of the late marshal by the secretary of the Treasury, and forming a part of the aggregate found by the verdict of the jury, were so advanced in conformity with the law, as to create a liability on the part of the sureties of the marshal for their proper application by that officer? and

2. Whether the several sums admitted to have been paid to the marshal upon executions for fines, forfeitures, and costs adjudged against various defendants, and as to a part of which sums the marshal or his deputy had made upon "the dockets of the court," the following entries, "money made and ready" and "money paid;" and as to other portions of which levied on executions for fines and forfeitures, the marshal had made on the executions themselves this entry, "satisfied marshal," were so proved to have been received by the marshal in virtue of his office, as to render his sureties responsible for these latter sums?

Under the first of these inquiries, it is contended for the plaintiff in error, that the act of Congress of January 31, 1823, expressly prohibits the advancing of public money in any case whatsoever, except under the special direction of the President, to the disbursing officers of the government, for the faithful and prompt discharge of their public duties, and to the fulfilment of the public faith: and it is insisted upon as the correct interpretation of this statute, that the power thereby vested to make advances for the

public service, is not one appertaining to the office of President, but is an authority strictly personal and ministerial, to be exercised in every instance only by the individual himself, by his own hand, and never in any respect to be delegated. Such an interpretation of the law this court can by no means admit. While it has been doubtless the object of Congress to secure economy and regularity in public disbursements, and for that end to limit, as far as was proper, the discretion of subordinate agents over the public money, it never can be reasonable to ascribe to them a conduct which must defeat every beneficial end they could have in view, and render the government an absolutely impracticable machine. The President's duty in general requires his superintendence of the administration; yet this duty cannot require of him to become the administrative officer of every department and bureau, or to perform in person the numerous details incident to services which, nevertheless, he is, in a correct sense, by the Constitution and laws required and expected to perform. This cannot be, 1st, Because, if it were practicable, it would be to absorb the duties and responsibilities of the various departments of the government in the personal action of the one chief executive officer. It cannot be, for the stronger reason, that it is impracticable—nay, impossible. The position here assumed may be illustrated in the single example of a marshal. This officer has various duties to perform, which, though well understood, yet all of them, as to duration and extent, contingent, and varying, of course, as to the quantum of expense attending their performance. He is to summon and pay grand and petit juries and witnesses; to provide stationery and fuel for the court; guards for the transportation and safe-keeping of prisoners; to pay the per diem allowed to clerks and attorneys, and other incidental charges. If the argument for the plaintiff in error be correct, it would be indispensable either that the President should ascertain (and that too before their performance, or, in other words, their existence) these indefinable services, and, when so ascertained, that he, under his own hand, and none other, should give special written instructions for the payment of each one of them; or that the marshal should, upon credit, or from his own private resources, obtain the performance of these services, and await his reimbursement upon accounts to be subsequently allowed and cer-

tified by the court. Such consequences, so fraught with mischief to the public service, utterly forbid the construction of the law contended for by the plaintiff in error. If it be asked, How then shall the provisions and the purposes of the statute be fulfilled? the answer is obvious, and satisfies at once the meaning of the law and the public exigencies. Average estimates may be formed of the expenses incident to the courts, and instructions may be given by the President to the secretary of the Treasury to make advances from time to time, either upon the basis of those estimates, or upon statements or requisitions made by the marshals themselves, showing the necessity of advances to meet the public service. And this plain and only feasible mode of complying with the law appears to have been adopted and to have become the settled usage of the government, as is shown by the testimony of Asbury Dickins, admitted by the parties to be received as if taken upon oath. It is insisted, however, that if this interpretation of the statute be the true one, still a compliance with its requirements has not been shown; that neither is an order from the President to the secretary of the Treasury nor the copy of such an order produced; nor is the absence of both or either of these so accounted for as to authorize the admission of inferior evidence to supply their place. How stands this objection? Dickins, formerly a clerk in the Treasury Department, states it to be a fact "within his recollection, that soon after the passing of the act of January 31, 1823, concerning the disbursement of the public money, the secretary of the Treasury was specially authorized and directed in writing, by the President of the United States, to make such advances of money, from time to time, to various classes of disbursing officers of the government, and among others to the marshals, as should be found necessary to the faithful and prompt discharge of their respective duties, and to the fulfilment of the public engagements. The papers containing these directions of the President were, as he believes, destroyed in the late burning of the Treasury building." The general principle as to the admissibility of secondary evidence is familiar to all, and will receive no comment from the court; but we will simply inquire whether the facts here shown do not present a case falling within the operation of that principle? What does Dickins prove? 1st, The existence of the special written instruc-

tion from the President, made expressly to carry into effect the law of 1823, and forming the established rule and usage of the department; 2d, The conflagration of the Treasury Department, the legal and proper depository for this instruction; and, 3dly, The belief of the witness, then a clerk in the Department, and, by consequence, to a great extent cognisant of its arrangement and condition, that the document was destroyed in that conflagration. Authorities need not be multiplied to show that the case before us is completely within the rule respecting secondary evidence; a single decision of this court will be cited, as placing that matter wholly beyond controversy. In Riggs *v.* Tayloe, 9 Wheat. 486, the court, after laying down the general rule, proceeds thus: "It is contended that the affidavit is defective; not being sufficiently certain and positive as to the loss of the particular writing. The affiant only states his impression that he tore it up; and if he did not tear it up, it has become lost or mislaid; that this is in the alternative, and not certain and positive. We do not concur in this reasoning. An impression is an image fixed in the mind; it is belief; and believing the paper in question was destroyed has been deemed sufficient to let in the secondary evidence." The testimony of Dickins appears to this court much more direct upon the point than that admitted in the case of Riggs *v.* Tayloe: we consider it as fully justifying oral proof of the contents of the instrument to which it related, and as establishing the character and import of that instrument, as well as the usage founded thereupon; and upon this fact of the usage, Dickins is corroborated by the testimony of Young, the chief clerk in the Treasury Department at the time of the trial.

In considering the second exception made by the defendant, it may be remarked that the grounds of the exception are not stated with that distinctness and precision necessary to clear it entirely of obscurity; still the statement is thought to contain enough to guide the court to a correct solution of the question involved. The second bill of exceptions sets forth that the plaintiffs produced the dockets and records of the court, showing that in a number of cases where judgments had been entered against defendants for common law fines, forfeitures, and costs, and the said defendants had paid the amounts so respectively adjudged against them to the marshal, and entries were made by the said

marshal or his deputy, on the said dockets, "money made and ready," "money paid;" and that the amounts so received amounted, &c. And again: The plaintiffs further proved by the dockets, records, &c., that certain sums of money were adjudged by the court against certain defendants for fines, forfeitures, &c., upon which judgments writs of *ca. sa.* were issued, which writs were returned by the marshal, "satisfied marshal," and showed that the said sums amounted, &c. In the evidence set forth upon the face of these exceptions, nothing particular is disclosed relative to the modes of proceeding on executions, or of the means in practice by the court for recording and preserving the evidence of such proceedings, or of the acts and returns of the officers who may be charged with the management of final process; of course nothing is adduced to impeach the regularity of the reception by the court, of the returns and entries made by the marshal, or of the manner of placing them permanently upon the archives of the court. But it is admitted in the exception, that all these things are apparent on the records, viz.: The judgments and executions; the receipt of the money by the marshal, and his admissions of the receipt thereof, both by himself and his deputies. These facts are conceded to be parts of the records of the court to which the officer properly belonged, and before which his conduct was regularly cognisable: a tribunal in all respects competent to pass upon his acts; competent to fashion its records, and to preserve the evidences of its own proceedings and of the acts of its officers. The acts of this court, then, must, in the first instance, be presumed to be regular, and in conformity with settled usage; and they are conclusive until they shall be reversed by a competent power, and upon a case properly made. Upon both the instructions given and excepted to, in this cause, we approve the opinion of the Circuit Court, and therefore affirm the same.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Washington, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be and the same is hereby affirmed.

ANDREW DUNCAN, PLAINTIFF IN ERROR, *v.* ISAAC DARST, HENRY DARST, AND JACOB DARST, DEFENDANTS.

A person in custody under a *capias ad satisfaciendum* issued under the authority of the Circuit Court of the United States, cannot legally be discharged from imprisonment by a state officer, acting under a state insolvent law.

THIS case came up by writ of error from the Circuit Court of the United States for the eastern district of Pennsylvania.

The facts in the case were not disputed, and were as follow:

Isaac Darst, Henry Darst, and Jacob Darst, citizens of the state of Ohio, recovered a judgment in the Circuit Court of Pennsylvania, against one Jacob Roth, who was arrested on a *capias ad satisfaciendum*, and handed over for safe-keeping to Andrew Duncan, sheriff of the county of York. This was on the 6th of December, 1832. On the next day, Roth applied to George Barnitz, an associate judge of the Court of Common Pleas for the county of York, for the benefit of an act of the legislature of Pennsylvania, passed on the 28th of March, 1820, entitled, "A supplement to the act entitled A supplement to the act entitled An act for the relief of insolvent debtors, passed the twenty-ninth of January, one thousand eight hundred and twenty."

The first section of the act referred to is as follows:

"That if any debtor shall hereafter be arrested or held in execution, on a bail piece, in a civil suit, and who shall have resided six months in this commonwealth previously thereto, he may apply, when arrested on execution, to the president or any associate judge of the Court of Common Pleas of the county in which he is so arrested, or when held on a bail piece, may apply to the president or associate judge of the said court, in the county in which the suit was instituted, and give bond to the plaintiff or plaintiffs, at whose suit he is so arrested and held, with such security as shall be required and approved of by the said judge: the condition of which bond shall be, that the said debtor shall be and appear at the next Court of Common Pleas for said county, and there take the benefit of the insolvent laws of this commonwealth, and to surrender himself to the jail of the said county, if he fail to comply with all things required by law to

Read, in reply:

The argument made on the other side takes the same ground as the dissenting opinion of Mr. Justice Thompson, in the case of Ogden *v.* Saunders. But the court did not so think. In 1819, Pennsylvania passed a law exempting females from imprisonment for debt, which was not enacted by Congress until 1838. In the mean time, they would have been subject to this process from the federal court, if the argument on the other side be correct. In 1828, it was declared that the United States courts should have the same rules as state courts. Suppose a man imprisoned under process from both courts; could he come out, under the insolvent law, from one and not the other? If so, how have they both the same rules?

Mr. Justice CATRON delivered the opinion of the court.

It appears from the record that in 1824 Darst and others recovered, in the Circuit Court of the United States for the eastern district of Pennsylvania, a judgment against Jacob Roth, for the sum of $5465.

In November, 1832, a *capias ad satisfaciendum* was sued out against him, returnable to the April term, 1833, of the court. On the 6th of December, 1832, the marshal arrested Roth, and delivered him to Duncan, the sheriff and jailer of York county, for safe-keeping in the jail of that county, until discharged by due course of law. On the 7th of December, Duncan discharged him from custody, and the present suit was brought for an escape.

He pleaded in justification, that Roth applied to G. B., an associate judge of the Court of Common Pleas of York county, gave bond and security to appear at the next Court of Common Pleas, then and there to take the benefit of the insolvent laws of Pennsylvania; and to surrender himself to the jail of the county, if he failed to comply with all things required by law, to entitle him to be discharged, &c. To this plea there was a demurrer, and judgment for the plaintiffs.

To the regularity of the writ of *capias ad satisfaciendum*; to its execution on the body of Roth; or to his delivery to Duncan as the proper jailer to receive him, there is no objection made: the case turns exclusively on the question, whether by giving

bond and security to appear in the insolvent court, the sheriff was authorized to release Roth from imprisonment.

It is admitted that had Roth been arrested by a sheriff on a *ca. sa.*, issued from a state court of Pennsylvania, a discharge would have been proper on his giving the bond: and it is contended the same consequence followed in this case, because the acts of Congress had adopted the modes of proceeding on final process, governing the state courts and officers.

This brings up the question, to what extent Congress had adopted the various causes of discharge, (in 1832,) provided by the state laws, for the release of debtors, imprisoned by virtue of writs of *ca. sa.* issued by courts of the United States: beyond the state laws adopted, it is settled the federal courts are not bound to conform to state regulations. What state laws apply, and regulate the modes of proceeding in the courts of the United States, depends on a proper understanding of the acts of Congress, on the subject.

The first in order, is that of 1789, c. 21, s. 2; which declares, the forms of writs and executions, and the modes of process in suits at common law, shall be the same in each state respectively as are now used, or allowed in the Supreme Courts of the same. This act was temporary, but is referred to, and in part sanctioned, by that of 1792, c. 36, s. 2. This declares: That the forms and modes of proceeding, in suits at common law, shall be the same as are now used in the courts of the United States respectively, in pursuance of the act of 1789, c. 21.

By the first section of the act of 1828, c. 68, the then processes and modes of proceeding of the highest state court of original jurisdiction, are prescribed as applicable to the courts of the United States in the states respectively that came into the Union, after 1789.

But the third section applies to the old and new states equally, except Louisiana; and declares:—"That writs of execution, and other final process, issued on judgments and decrees, and the proceedings thereupon, shall be the same in each state, respectively, as are now used in the courts of such state." Giving the courts power to alter final process by rules so far only, as to conform to any state law subsequently passed, on the subject. No rules have been adopted in Pennsylvania, and the acts of Congress referred to therefore govern this case.

The terms, "modes of process," in the act of 1789; and, "proceedings upon executions, and other final process," in the act of 1828, have the same meaning, and include all the regulations and steps incident to that process, from its commencement to its termination as prescribed by the state laws; so far as they can be made to apply to the federal courts: as this court held in Wayman *v.* Southard, 10 Wheat. 27, 28, and also, in Beers *v.* Houghton, 9 Peters; United States *v.* Knight, 14 Peters; Amis *v.* Smith, 16 Peters, 312.

Congress however did not intend to defeat the execution of judgments rendered in the courts of the United States; but meant they should have full effect by force of the state laws adopted: and therefore all state laws regulating proceedings, affecting insolvent persons; or that are addressed to state courts, or magistrates in other respects; which confer peculiar powers on such courts and magistrates, do not bind the federal courts, because they have no power to execute such laws. The case of Palmer *v.* Allen, 7 Cranch, 563, is to this effect. Palmer as deputy marshal arrested Allen on a *capias ad respondendum*, in the district of Connecticut, and imprisoned him. By the laws of that state, this could not be done, without a mittimus from a magistrate. This court held the process acts did not adopt the law of Connecticut, which required the mittimus: "That it was a peculiar municipal regulation, not having any immediate relation to the progress of the suit, and only imposing a restraint on the state officers; but altogether inoperative upon those of the United States." Had it been necessary to ask the aid of the magistrate, to execute the process; then he would have had the discretion to refuse, and thereby to defeat it.

As state courts, or magistrates, cannot be compelled to aid a federal court in the exercise of its jurisdiction; so neither can they be permitted to restrain its process by injunction, or otherwise, as was held in McKim *v.* Voorhies, 7 Cranch. It follows, that a state law, regulating the practice of state courts, and addressed to its judges and magistrates; but which can only be executed by them, or with their aid, is a peculiar municipal regulation; not adopted by the acts of Congress, nor applicable to the courts of the United States.

The case of Duncan must be tested by these rules. Roth ap-

plied to a judge of the Common Pleas, and gave a bond, to appear at that court, at its next term, and take the benefit of the insolvent laws. On this single step being taken, the jailer discharged him. The proceeding had no reference to the process by which Roth was imprisoned; but to a new proceeding, proposed to be instituted, by which all his property should be equally distributed among all his creditors; and his person be exempted in future from arrest for his existing debts when discharged.

As all the creditors of Roth had the right to become parties to the proceeding in the insolvent court, no matter where they resided, it is manifest the Circuit Court of the United States could take no jurisdiction of the parties, nor execute the insolvent law, had an application been made to that court for such purpose. It is therefore a peculiar law, as respects the court of the United States; is strictly municipal in its character: and as it could only be executed by the state courts, no action under it, by these courts, could affect the process by which Roth was imprisoned.

This opinion is in conformity to the decision of the Supreme Court of Pennsylvania, in the case of Duncan *v.* Klinefetter, 5 Watts's Rep. 141. That was an action on the case, by the present plaintiff in error, Duncan, against the jailer his deputy, for discharging Roth; whereby, Duncan alleged he had sustained damage.

It is insisted the foregoing conclusion is in conflict with the decision of this court in the case of Beers *v.* Haughton, 9 Peters; and which decision is confidently relied on as governing this case. In that case, Beers sued Harris, in the Circuit Court of Ohio; Haughton became bail for Harris. Judgment was recovered in December, 1830; a *ca. sa.* was run against Harris, and returned not found.

In February, 1832, Harris took the benefit of the insolvent law of Ohio: by this proceeding his person was exempted from arrest in all cases, for debts previously contracted.

In December, 1832, Beers sued Haughton on the bail bond; who pleaded and relied on the discharge of Harris.

By the laws of Ohio, the bail has the right to surrender the principal at any time before he is thus sued, and served with the process.

Haughton undertook that Harris should surrender his person, if he failed to pay the debt. To enforce this condition, the *ca. sa.* issued. The bail had the right to arrest the principal, and deliver

him to the marshal, who could imprison the debtor as if arrested by the *ca. sa.* Not being subject to imprisonment after the discharge under the insolvent law, the marshal could not receive the prisoner; nor could he have lawfully arrested him. It followed, the bail was equally inhibited; and of course discharged from performance, by the act of the law; just as certainly as he would have been discharged by the act of God, had Harris died, at the time he was released under the insolvent act. This is the doctrine settled in Beers *v.* Haughton.

Had Roth been discharged in the insolvent court, by its judgment, from future imprisonment, before the *ca. sa.* was executed by the marshal; then a case would have arisen, to which the principle declared in that of Beers *v.* Haughton would apply; as the state of Pennsylvania had the undoubted right to exempt persons thus discharged from imprisonment for debt: so she might exempt all persons whatever. But it does not follow, that one not excepted from the operation of the general law, who had been properly arrested, and imprisoned by the process of a federal court, could be discharged by a state judge. The general rule is,—10 Co. 76, b, same cases cited in note, 5 Watts's R. 144,—(and nothing is better settled,) that an officer is not justified in obeying the order of a judge, or court, having no jurisdiction in the matter; and this rule applies in an especial manner, as between the state and federal courts; where it never has been supposed, that the judges of the one, could control the process of the other. If it was otherwise, and writs of injunction, of *supersedeas*, and orders to discharge defendants from imprisonment, could be granted by state courts, or judges, to render ineffectual process issued from the courts of the United States, the jurisdiction of the latter might be, and probably would be, overthrown in parts of the Union; as it would be the exercise of the power of PROHIBITION; and might be extended to defeat the fruits of all judgments rendered by federal courts, at the discretion of state courts and judges. A conflict of jurisdiction, fraught with more dangerous consequences, could not well be supposed: and to concede the validity of the discharge of Roth, would involve such a consequence, however innocently meant by the state judge; of whose integrity of intention, we have no doubt.

If, during Roth's confinement in prison, he had been declared

insolvent, by the Court of Common Pleas of York county; then it might have been a question properly made before the Circuit Court of the United States, whether he should be discharged from imprisonment. But as such a motion would have called into exercise the legal discretion of the court upon a mixed question of law and fact; it can be affirmed with something like safety, that the merely giving a bond to appear before the insolvent court, would not have been sufficient to authorize his release from imprisonment. Be this as it may, that court alone had jurisdiction to act in the matter.

It is insisted for the defendant in error, that the act of Congress of 1800, c. 4, for the relief of persons imprisoned for debt, is the only law by which a discharge can be had, from a *ca. sa.*, awarded by a court of the United States. We do not think so. By that law, the district judges are authorized by themselves, or through commissioners appointed for the purpose, to discharge the debtor: he must show, and swear, that he is not worth thirty dollars; and give notice to the execution creditor, before a discharge can be ordered. The debtor may have, and usually has, outstanding claims to choses in action, and interests in property of various kinds; perhaps contingent, and remote; probably of little value, or it might turn out they are of much value: and as he has to swear, that he has no estate real or personal, in possession, reversion, or remainder, to the amount or value of thirty dollars, it will often happen the oath cannot be taken, by the most honest and conscientious debtor. The consequence is, he must remain in prison until the humanity of the creditor interposes: and as he usually resides at a distance, cases of the greatest hardship and distress may occur, if the state laws afford no additional remedy. Whereas, by the laws of some of the states, he may give bond and security, when the process issues from a state court, to the sheriff, to appear at the return term of the writ, and give in a schedule of his property; the title and possession of which are conferred on the sheriff for the benefit of the execution creditor; and the proceeds are applied to the satisfaction of the judgment: and then the debtor is permitted to take the insolvent oath, and be discharged.

As the marshals and courts of the United States, are necessarily governed by the same rules that the sheriffs and courts of the

respective states are, in this respect, they must proceed in the same manner.

So there are other modes of discharge prescribed by the state laws, that can be executed just as conveniently and properly, by the federal courts and judges, as they can be by the state courts or judges, in cases where the execution issues from the latter courts. State laws of this description have been adopted by the acts of Congress, as incident to the remedy: they are cumulative, and in addition to the act of Congress of 1800; both being in force.

As we have adopted in effect the same construction, where property had been levied on, in Amis *v.* Smith, 16 Peters, 312, it would be harsh to hold otherwise, in restraint of personal liberty.

In that case, a forthcoming bond, for property levied on, had been taken by the marshal, and the property been released according to the laws of Mississippi; the statute of that state, authorizing such a bond and the release of the property. This mode of proceeding was held to be incident to the process of execution, because it had been adopted by the act of Congress of 1828: previously, no delivery bond could have been taken, nor the property released by the marshal.

If bond and security could be taken for the delivery of property seized; the same could not be refused, for the appearance at court of the defendant; conditioned that he give in a schedule of his property, and take the benefit of the insolvent laws; when the statutes of the state where the proceeding was had, expressly commanded it to be done in like cases, under process issued from the state courts, directed to their officers.

We think the judgment of the Circuit Court upon the demurrer was correct, and order it to be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the eastern district of Pennsylvania, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be and the same is hereby affirmed, with costs and damages at the rate of 6 per centum per annum.

ARTHUR BRONSON, COMPLAINANT, *v.* JOHN H. KINZIE AND JULIETTE A., HIS WIFE, EDMUND K. BUSSING AND JOHN S. BUSSING, THE PRESIDENT, DIRECTORS, AND COMPANY OF THE STATE BANK OF ILLINOIS, JAY HATHWAY, MARY ANN WOLCOTT, DANIEL S. GRISWOLD, CAROLINE DUNHAM, AND ALONZO HUNTINGTON, DEFENDANTS.

A state law, passed subsequently to the execution of a mortgage, which declares that the equitable estate of the mortgagor shall not be extinguished for twelve months after a sale under a decree in chancery, and which prevents any sale unless two-thirds of the amount at which the property has been valued by appraisers shall be bid therefor, is within the clause of the tenth section of the first article of the Constitution of the United States, which prohibits a state from passing a law impairing the obligation of contracts.

Mr. Chief Justice TANEY delivered the opinion of the court.

THIS case comes before the court upon a division of opinion in the Circuit Court of the United States for the district of Illinois, upon certain questions which arose in the case, and which have been certified to this court according to the act of Congress.

It appears from the record, that, on the 13th of July, 1838, John H. Kinzie executed a bond to Arthur Bronson, conditioned for the payment of $4000, on the 1st of July, 1842, with interest thereon, to be paid semi-annually; and, in order to secure the payment of the said sum of money and interest, Kinzie and wife, on the same day, conveyed to the said Bronson, in fee simple, by way of mortgage, one undivided half part of certain houses and lots in the town of Chicago, with the usual proviso that the deed should be null and void if the said principal and interest were duly paid; and Kinzie, among other things, covenanted that, if default should be made in the payment of the principal or interest, or any part thereof, it should be lawful for Bronson or his representatives to enter upon and sell the mortgaged premises at public auction, and, as attorney of Kinzie and wife, to convey the same to the purchaser; and out of the moneys arising from such sale, to retain the amount that might then be due him on the aforesaid bond, with the costs and charges of sale, rendering the overplus, if any, to Kinzie.

The interest not having been paid, Bronson, on the 27th of

March, 1841, filed his bill to foreclose the mortgage. In the mean time, after the mortgage was made, and before the bill was filed, the legislature of Illinois, on the 19th of February, 1841, passed a law, the 8th section of which provided that mortgagors and judgment creditors should have the same right to redeem mortgaged premises sold by the decree of a court of chancery, that had been given to the debtors and judgment creditors by a previous law passed in 1825, in cases where lands were sold under execution. The law of 1825 authorized the party whose lands should be sold by execution, after that law took effect, to redeem them within twelve months from the day of sale, by repaying the purchase-money with interest at the rate of 10 per cent.; and if the debtor did not redeem it within the time limited, any judgment creditor was authorized to do so upon the like terms, within fifteen months from the sale. This act, which took effect on the 1st of May, 1825, was held, it seems, not to extend to sales of mortgaged premises under a decree of foreclosure; and the act of February 19, 1841, above mentioned, was passed to embrace them.

By another act of the legislature of Illinois, approved the 27th of February, 1841, it was directed that, "when any execution should be issued out of any of the courts of the state, and be levied on any property, real or personal, or both, it should be the duty of the officer levying such execution to summon three householders of the proper county, one of whom should be chosen by such officer, one by the plaintiff, and one by the defendant in the execution; or, in default of the parties making such choice, the officer should choose for them; which householders, after being duly sworn by such officer so to do, should fairly and impartially value the property upon which such execution was levied, having reference to its cash value; and that they should endorse the valuation thereof upon the execution, or upon a piece of paper thereunto attached, signed by them; and when such property should be offered for sale, it should not be struck off, unless two-thirds of the amount of such valuation should be bid therefor." It further provided, among other things, that all sales of mortgaged property should be made according to the provisions of that act, whether the foreclosure of said mortgage was by judgment at law or decree in chancery. It also directed that the pro-

visions of this law should extend to all judgments rendered prior to the 1st of May, 1841, and to all judgments that might be rendered on any contract or cause of action accruing prior to that day, and not to any other judgments than as before specified. These are, in substance, the provisions of these acts, as far as they are material to the present controversy.

On the 19th of June, 1841, after the laws above mentioned had been passed, the Circuit Court of the United States for the district of Illinois adopted the following rules:

"Ordered, that when the marshal shall levy an execution upon real estate, he shall have it appraised and sold under the provisions of the law of this state, entitled 'An act regulating the sale of property,' approved February 27, 1841, if the case come within the provisions of that law; and any two or three householders selected under the law, agreeing, may make the valuation of the premises required.

"Before the sale of any real estate on execution, the marshal shall give notice thirty days in a newspaper published in the county where the land lies; and if there be no paper published in the county, then the notice shall be given thirty days before the sale, by notice, as the statute requires. The court adopt the 8th section of the act of this state, to amend the act concerning judgments, &c., passed 19th of February, 1841, which regulates the sale of mortgaged premises, &c., except where special direction shall be given in the decree of sale."

After these rules were adopted—that is to say, at December term, 1841—the bill filed by Bronson, as hereinbefore mentioned, came on for final hearing in the Circuit Court; and thereupon the complainant moved the court for a final decree of strict foreclosure of said mortgage, or that the mortgaged premises should be sold to the highest bidder, without being subject to said rule and the act referred to. This motion was resisted on part of defendants, who moved that the decree should direct the sale according to said rule and act.

And the judges being opposed in opinion on the following points, to wit:

1. Whether the decree in this case should be so entered as to direct the sale of the said mortgaged premises according to the said statute of the state of Illinois above mentioned; or whether

the same premises should be sold at public auction, to the highest bidder, without regard to the said law.

2. Whether the decree in this case shall or shall not direct the sale of the mortgaged premises, without being first valued by three householders, and without requiring two-thirds of the amount of the said valuation to be bid, according to the said act of the state of Illinois.

3. Whether the terms of the mortgage in this case do or do not require it to be excepted from the operation of the rule above recited.

On motion of the complainant, it was ordered and directed that this cause, with said points, be certified to the Supreme Court, in pursuance of the act of Congress. And it is upon these questions, thus certified, that the case is now before us; and the 8th section of the act of February 19th, and the entire act of February 27, are set forth at large in the record, as the laws referred to in the above-mentioned rules of the Circuit Court. The case has been submitted to the court, for decision, by a written agreement between the counsel on both sides. On the part of the complainant, a printed argument has been filed, but none has been offered on behalf of the defendant. As the case involves a constitutional question of great importance, we should have preferred a full argument at the bar. But the parties are entitled, by the rules of the court, to bring it before us in the manner they have adopted; and it being our duty to decide the questions certified to us by the Circuit Court, we have bestowed upon the subject the careful and deliberate consideration which its importance demands.

Upon the points certified, the question is, whether the laws of Illinois, of the 19th and the 27th of February, 1841, come within that clause of the 10th section of the 1st article of the Constitution of the United States, which prohibits a state from passing a law impairing the obligation of contracts.

The laws of a state, regulating the process of its courts, and prescribing the manner in which it shall be executed, of course, do not bind the courts of the United States, whose proceedings must be governed by the acts of Congress. The act of 1792, however, adopted the process used in the state courts, as it stood in 1789; and, since then, the act of 1828, on the same subject,

has been passed: and the 3d section of this law directs that final process issued on judgments and decrees in any of the courts of the United States, and the proceedings thereupon, shall be the same, except their style, in each state, respectively, as were then used in the courts of such state, and authorizes the courts of the United States, if they see fit, in their discretion, by rules of court, so far to alter final process as to conform the same to any change which might afterwards be adopted, by the legislatures of the respective states, for the state courts. Any acts of a state legislature, therefore, in relation to final process, passed since 1828, are of no force in the courts of the United States, unless adopted by rules of court, according to the provisions of this act of Congress. And, although such state laws may have been so adopted, yet they are inoperative and of no force, if in conflict with the Constitution or an act of Congress.

As concerns the obligations of the contract upon which this controversy has arisen, they depend upon the laws of Illinois as they stood at the time the mortgage deed was executed. The money due was indeed to be paid in New York. But the mortgage given to secure the debt was made in Illinois for real property situated in that state, and the rights which the mortgagee acquired in the premises depended upon the laws of that state. In other words, the existing laws of Illinois created and defined the legal and equitable obligations of the mortgage contract.

If the laws of the state passed afterwards had done nothing more than change the remedy upon contracts of this description, they would be liable to no constitutional objection. For, undoubtedly, a state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. It may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not by every sovereignty, according to its own views of policy and humanity. It must reside in every state to enable it to secure its citizens from unjust and

harassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community. And, although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution.

This subject came before the Supreme Court in the case of Green *v.* Biddle, decided in 1823, and reported in 8 Wheat. 1. It appears to have been twice elaborately argued by counsel on both sides, and deliberately considered by the court. On the part of the demandant in that case, it was insisted that the laws of Kentucky passed in 1797 and 1812, concerning occupying claimants of land, impaired the obligation of the compact made with Virginia in 1789. On the other hand, it was contended that these laws only regulated the remedy, and did not operate on the right to the lands. In deciding the point the court say, "It is no answer that the acts of Kentucky now in question are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests." And in the opinion delivered by the court after the second argument, the same rule is reiterated in language equally strong. (See pages 75.* 76, and 84.) This

* "Nothing, in short, can be more clear, upon principles of law and reason, than that a law which denies to the owner of land a remedy to recover the possession of it when withheld by any person, however innocently he may have obtained it; or to recover the profits received from it by the occupant; or which clogs his recovery of such possession and profits, by conditions and restrictions tending to diminish the value and amount of the thing recovered, impairs his right to, and interest in, the property. If there be no remedy to recover the possession, the law necessarily presumes a want of right to it. If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist, and be acknowledged, but it is impaired, and rendered insecure, according to the nature and extent of such restrictions." 8 Wheat. 75.

judgment of the court is entitled to the more weight, because the opinion is stated in the report of the case to have been unanimous; and Judge Washington, who was the only member of the court absent at the first argument, delivered the opinion of the second.

We concur entirely in the correctness of the rule above stated. It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing. And no one, we presume, would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or encumbered it with conditions that rendered it useless or impracticable to pursue it. Blackstone, in his Commentaries on the Laws of England, 1 vol. 55, after having treated of the declaratory and directory parts of the law, defines the remedial in the following words:

"The remedial part of the law is so necessary a consequence of the former two, that laws must be very vague and imperfect without it. For, in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights when wrongfully withheld or invaded. This is what we mean properly when we speak of the protection of the law. When, for instance, the declaratory part of the law has said that the field or inheritance which belonged to Titius's father is vested by his death in Titius; and the directory part has forbidden any one to enter on another's property without the leave of the owner; if Gaius, after this, will presume to take possession of the land, the remedial part of the law will then interpose its office, will make Gaius restore the possession to Titius, and also pay him damages for the invasion."

We have quoted the entire paragraph, because it shows, in a few plain words, and illustrates by a familiar example, the connection of the remedy with the right. It is the part of the municipal law

which protects the right, and the obligation by which it enforces and maintains it. It is this protection which the clause in the Constitution now in question mainly intended to secure. And it would be unjust to the memory of the distinguished men who framed it, to suppose that it was designed to protect a mere barren and abstract right, without any practical operation upon the business of life. It was undoubtedly adopted as a part of the Constitution for a great and useful purpose. It was to maintain the integrity of contracts, and to secure their faithful execution throughout this Union, by placing them under the protection of the Constitution of the United States. And it would but ill become this court, under any circumstances, to depart from the plain meaning of the words used, and to sanction a distinction between the right and the remedy, which would render this provision illusive and nugatory; mere words of form, affording no protection, and producing no practical result.

We proceed to apply these principles to the case before us. According to the long-settled rules of law and equity in all of the states whose jurisprudence has been modelled upon the principles of the common law, the legal title to the premises in question vested in the complainant, upon the failure of the mortgagor to comply with the conditions contained in the proviso; and at law, he had a right to sue for and recover the land itself. But, in equity, this legal title is regarded as a trust estate, to secure the payment of the money; and, therefore, when the debt is discharged, there is a resulting trust for the mortgagor. Conard *v.* The Atlantic Insurance Company, 1 Peters, 441. It is upon this construction of the contract, that courts of equity lend their aid either to the mortgagor or mortgagee, in order to enforce their respective rights. The court will, upon the application of the mortgagor, direct the reconveyance of the property to him, upon the payment of the money; and, upon the application of the mortgagee, it will order a sale of the property to discharge the debt. But, as courts of equity follow the law, they acknowledge the legal title of the mortgagee, and never deprive him of his right at law until his debt is paid; and he is entitled to the aid of the court to extinguish the equitable title of the mortgagor, in order that he may obtain the benefit of his security. For this purpose, it is his absolute and undoubted right, under an ordinary mortgage deed,

if the money is not paid at the appointed day, to go into the Court of Chancery, and obtain its order for the sale of the whole mortgaged property, (if the whole is necessary,) free and discharged from the equitable interest of the mortgagor. This is his right, by the law of the contract; and it is the duty of the court to maintain and enforce it, without any unreasonable delay.

When this contract was made, no statute had been passed by the state changing the rules of law or equity in relation to a contract of this kind. None such, at least, has been brought to the notice of the court; and it must, therefore, be governed, and the rights of the parties under it measured, by the rules above stated. They were the laws of Illinois at the time; and, therefore, entered into the contract, and formed a part of it, without any express stipulation to that effect in the deed. Thus, for example, there is no covenant in the instrument giving the mortgagor the right to redeem, by paying the money after the day limited in the deed, and before he was foreclosed by the decree of the Court of Chancery. Yet no one doubts his right or his remedy; for, by the laws of the state then in force, this right and this remedy were a part of the law of the contract, without any express agreement by the parties. So, also, the rights of the mortgagee, as known to the laws, required no express stipulation to define or secure them. They were annexed to the contract at the time it was made, and formed a part of it; and any subsequent law, impairing the rights thus acquired, impairs the obligations which the contract imposed.

This brings us to examine the statutes of Illinois which have given rise to this controversy. As concerns the law of February 19, 1841, it appears to the court not to act merely on the remedy, but directly upon the contract itself, and to engraft upon it new conditions injurious and unjust to the mortgagee. It declares that, although the mortgaged premises should be sold under the decree of the Court of Chancery, yet that the equitable estate of the mortgagor shall not be extinguished, but shall continue for twelve months after the sale; and it moreover gives a new and like estate, which before had no existence, to the judgment creditor, to continue for fifteen months. If such rights may be added to the original contract by subsequent legislation, it would be difficult to say at what point they must stop. An equitable

interest in the premises may, in like manner, be conferred upon others; and the right to redeem may be so prolonged, as to deprive the mortgagee of the benefit of his security, by rendering the property unsaleable for any thing like its value. This law gives to the mortgagor, and to the judgment creditor, an equitable estate in the premises, which neither of them would have been entitled to under the original contract; and these new interests are directly and materially in conflict with those which the mortgagee acquired when the mortgage was made. Any such modification of a contract by subsequent legislation, against the consent of one of the parties, unquestionably impairs its obligations, and is prohibited by the Constitution.

The second point certified arises under the law of February 27, 1841. The observations already made in relation to the other act apply with equal force to this. It is true that this law apparently acts upon the remedy, and not directly upon the contract. Yet its effect is to deprive the party of his pre-existing right to foreclose the mortgage by a sale of the premises, and to impose upon him conditions which would frequently render any sale altogether impossible. And this law is still more objectionable, because it is not a general one, and prescribing the mode of selling mortgaged premises in all cases, but is confined to judgments rendered, and contracts made, prior to the 1st of May, 1841. The act was passed on the 27th of February in that year; and it operates mainly on past contracts, and not on future. If the contracts intended to be affected by it had been specifically enumerated in the law, and these conditions applied to them, while other contracts of the same description were to be enforced in the ordinary course of legal proceedings, no one would doubt that such a law was unconstitutional. Here a particular class of contracts is selected, and encumbered with these new conditions; and it can make no difference, in principle, whether they are described by the names of the parties, or by the time at which they were made.

In the case before us, the conflict of these laws with the obligations of the contract is made the more evident by an express covenant contained in the instrument itself, whereby the mortgagee, in default of payment, was authorized to enter on the premises, and sell them at public auction; and to retain out

of the money thus raised, the amount due, and to pay the overplus, if any, to the mortgagor. It is impossible to read this covenant, and compare it with the laws now under consideration, without seeing that both of these acts materially interfere with the express agreement of the parties contained in this covenant. Yet, the right here secured to the mortgagee is substantially nothing more than the right to sell, free and discharged of the equitable interest of Kinzie and wife, in order to obtain his money. Now, at the time this deed was executed, the right to sell, free and discharged of the equitable estate of the mortgagor, was a part of every ordinary contract of mortgage in the state, without the aid of this express covenant; and the only difference between the right annexed by law and that given by the covenant consists in this: that in the former case, the right of sale must be exercised under the direction of the Court of Chancery, upon such terms as it shall prescribe, and the sale made by an agent of the court; in the latter, the sale is to be made by the party himself. But, even under this covenant, the sale made by the party is so far subject to the supervision of the court, that it will be set aside, and a new one ordered, if reasonable notice is not given, or the proceedings be regarded, in any respect, as contrary to equity and justice. There is, therefore, in truth but little material difference between the rights of the mortgagee with or without this covenant. The distinction consists rather in the form of the remedy, than in the substantial right; and as it is evident that the laws in question invade the right secured by this covenant, there can be no sound reason for a different conclusion, where similar rights are incorporated by law into the contract, and form a part of it at the time it is made.

Mortgages made since the passage of these laws must undoubtedly be governed by them; for every state has the power to prescribe the legal and equitable obligations of a contract to be made and executed within its jurisdiction. It may exempt any property it thinks proper from sale, for the payment of a debt; and may impose such conditions and restrictions upon the creditor as its judgment and policy may dictate. And all future contracts would be subject to such provisions; and they would be obligatory upon the parties in the courts of the United States, as well as in those of the state. We speak, of course, of con-

tracts made and to be executed in the state. It is a case of that description that is now before us; and we do not think it proper to go beyond it.

Upon the questions presented by the Circuit Court, we therefore answer:

1. That the decree should direct the premises to be sold at public auction to the highest bidder, without regard to the law of February 19, 1841, which gives the right of redemption to the mortgagor for twelve months, and to the judgment creditor for fifteen.

2. That the decree should direct the sale of the mortgaged premises, without being first valued by three householders, and without requiring two-thirds of the amount of the said valuation to be bid according to the law of February 27, 1841.

The decision of these two questions disposes of the third. And we shall direct these answers to be certified to the Circuit Court.*

Mr. Justice McLEAN dissented.

The act of Illinois of the 27th February, 1841, does not apply to the case under consideration. The rule of the Circuit Court adopting that act, limits it to executions on judgments at law. It can have no application, therefore, to any proceeding in chancery. The only rule adopted in relation to a chancery proceeding, is that which gives the mortgagor a year within which to redeem the premises sold, on the payment of the purchase-money and 10 per cent. interest, agreeably to the 8th section of the act of 19th February, 1841. And that rule was to operate only in decrees of foreclosure and sale, where a different order was not made. So that, in fact, no positive rule was adopted in Illinois by the Circuit Court, in relation to sales of mortgaged premises under a decree.

By the rules regulating chancery proceedings adopted by this court at its last term, it is supposed the above rule and all others regulating the practice in chancery was rescinded. But this is not material. The points certified would be answered by saying, that the acts of the legislature referred to can have no operation

* Present Mr. Chief Justice TANEY, and Justices THOMPSON, McLEAN, BALDWIN, WAYNE, CATRON, and DANIEL.

in the case; as no state law can govern the proceedings of a chancery court of the United States.

Under such circumstances, I cannot but regret that the court have deemed it necessary or proper to consider the constitutionality of the above acts, and to hold that they are unconstitutional. The decision of the matters before the court does not require this judgment. And it is the more to be regretted, as there was no argument, written or oral, to sustain these laws. Heretofore this court have not deemed it proper to act on so grave a subject as the constitutionality of a state law, unless the question were essentially involved in the decision of the case before them.

The act of the 27th of February, 1841, is held to be unconstitutional as regards all contracts or mortgages entered into prior to its enactment, because it requires real property levied on by execution to be appraised and to sell for two-thirds of its value.

As preliminary to an examination of this question, I will take a cursory review of the policy and laws of the federal government in respect to state process. By the act of the 29th September, 1789, it is provided, "that the forms of writs and executions, except their style, in the Circuit and District Courts, in suits at common law, shall be the same in each state respectively as are now used, or allowed, in the Supreme Court of the same."

Again: By the act of the 8th of May, 1792, the above provision is re-enacted, "subject to such alterations and additions as the courts respectively shall, in their discretion, deem expedient; or to such regulations as the Supreme Court of the United States shall think proper, from time to time, by rule to prescribe to any Circuit or District Court concerning the same."

In the 8th section of the act of the 2d March, 1793, it is provided, "that where it is now required by the laws of any state, that goods taken in execution, on a writ of *fieri facias*, shall be appraised previous to the sale thereof, it shall be lawful for the appraisers appointed under the authority of the state to appraise goods taken in execution on a *fieri facias* issued out of any court of the United States, in the same manner as if such writ had issued out of a state court." And it is made the duty of the marshal to summon appraisers, &c.

Under the foregoing process acts, a question was made in the state of Kentucky, whether the executions from the Circuit Court

of the United States should be governed by the laws of that state. In the case of Wayman *v.* Southard, 10 Wheat. 2, among several points certified from the Circuit Court, for the decision of this court, were the two following:

"That, if the statutes of Kentucky, in relation to executions, are binding on this court, viz.: the statute which requires the plaintiff to endorse on the execution, that bank notes of the Bank of Kentucky, or notes of the Bank of the Commonwealth of Kentucky, will be received in payment, or that the defendant may replevy the debt for two years, are in violation of the Constitution of the United States."

"That all the statutes of Kentucky, which authorize a defendant to give a replevin bond, in satisfaction of a judgment or execution are unconstitutional and void."

This court held that the process acts of 1789, and of 1792, did not apply to states subsequently admitted into the Union; and that as the act regulating executions had not been adopted by the Circuit Court of the United States for Kentucky, it could not regulate final process in that court. But the court did not deem it necessary or proper to decide on the constitutionality of the laws referred to.

In the case of the Bank of the United States *v.* Halstead, 10 Wheat. 51, a point was certified from the Circuit Court of Kentucky, involving the question, whether "the act of Assembly of Kentucky, of the 21st December, 1821, which prohibits the sale of property taken under executions for less than three-fourths of its appraised value, was repugnant to the Constitution of the United States." And this court held, Judge Thompson giving the opinion, as in the case of Wayman *v.* Southard, that the law of the state did not apply to the courts of the United States, it never having been adopted. And they remark: "This renders it unnecessary to inquire into the constitutionality of the law of Kentucky."

These cases in principle are analogous to the one under consideration. The only rule of court affecting a proceeding in chancery having been repealed or rescinded by the general rules adopted by this court at its last term, and if not repealed does not apply; the laws of the state of Illinois, as regards the proceeding under consideration, are as inapplicable as were the laws of Ken-

tucky in the above cases. And it is a subject of regret, that the precedent of the above cases has not been followed in the present decision.

Out of the above decisions grew the process act of the 19th May, 1828. That act declares, "that writs of execution and other final process, issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereupon, shall be the same as are now used in the courts of the state." And power was given to "the courts, if they shall see fit in their discretion, by rules of courts, so far to alter final process in said courts as to conform the same to any change which may be adopted by the legislatures of the respective states for the state courts."

The above enactments show that the settled policy of the federal government is, to adopt the state laws regulating final process. And so far as the acts of Congress have operated, state laws have governed executions in the federal courts.

In Virginia real estate is not liable to be sold on execution. In Connecticut, and, I believe, in Massachusetts, lands are taken in satisfaction of judgments on a valuation. In Ohio, and in many of the other states, real estate must be sold for one-half or two-thirds of its valuation. In Indiana, and in some of the other states, the defendant has a right within twelve months to redeem his land sold on execution, on paying some 10 or 12 per cent. interest. In Virginia, Mississippi, and some of the other states, forthcoming bonds are given, which suspend further proceedings on executions, and in some degree changes the security under the judgment.

Now these laws prevail in some of the states, and there is no reason why, under the Constitution, they may not be adopted in all of them. If Virginia may withdraw her lands from execution, and Ohio admit them to be sold under a valuation, why may not Illinois do the same?

But I understand the objection to the Illinois statute is, its limited operation and its applicability to prior contracts.

The 2d section of the act provides, that it "shall extend to all judgments rendered prior to the 1st of May, 1841, and to all judgments that may be rendered on any contract or cause of action, accruing prior to the 1st May, 1841."

This provision may seem to be somewhat capricious and of doubtful policy; but the inquiry must be, does it violate the Constitution of the United States? On the 27th February, 1841, this law was enacted, and although it is limited in its effects, yet it is general in its provisions. And I know of no power in the Constitution to limit the legislative discretion of the states as to the duration of their enactments. The only question under this act as to its constitutionality must be, whether it impairs the obligations of contracts entered into before it was passed. And in this view, the question arises, whether the remedy, in the sense of the Constitution, can be considered as a part of the contract.

That the law objected to is remedial, no one can controvert. It does not purport to act upon contracts, but modifies the remedy for the enforcement of contracts. But my brethren suppose, that, as this remedy may be retarded by the limitation on the sale of land under judgments, the obligation of the contract is thereby impaired. This conclusion can only be sustained on the ground that the remedy is a part of the contract. On this hypothesis every contract embraces the existing remedy, and that remedy cannot be protracted by the legislature. This is a question of constitutional power, and cannot be affected by any notions of expediency. If the remedy be so modified as to protract the recovery of a debt a week, or a month, in the view now taken by the court, it impairs the obligation of the contract as clearly as any longer period of time. The question cannot, in any degree, depend upon time. What could be more preposterous than to say the legislature of a state may prolong the remedy a week, a month, or three months, but cannot prolong it beyond that period? Where shall this judicial discretion find a limit? There must be some limit. If the legislature may not modify the remedy at their discretion, in regard to existing contracts, they must be prohibited from making any change. Any departure from this rule of construction must depend upon the arbitrary decision of the courts. And each court, in this respect, may exercise its own discretion, until the question shall be settled by this tribunal.

But the question may be asked, suppose the legislature shall repeal all remedy; is the contract not thereby impaired? This question may be asked with no more propriety and effect than

many others. May not a state fail to appoint judges, clerks, and other officers essential to the administration of justice?

I am aware that, in the case of Green v. Biddle, 8 Wheat. 17, this court say: "It is no answer, that the acts of Kentucky, now in question, are regulations of the remedy, and not of the right to lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests."

The above question arose under the compact between Virginia and Kentucky, which declared, "that all private rights and interests of lands, within Kentucky, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws then existing in the state of Virginia."

The above article, say the court in their opinion, "declares in the most explicit terms that all private rights and interests of lands, derived from the laws of Virginia, shall remain valid and secure under the laws of Kentucky, and shall be determined by the laws then existing in Virginia. It plainly imports, therefore, that these rights and interests, as to their nature and extent, shall be exclusively determined by the laws of Virginia, and that their security and validity shall not be in any way impaired by the laws of Kentucky. Whatever law, therefore, of Kentucky does narrow these rights and diminish these interests, is a violation of the compact, and is consequently unconstitutional."

And again the court observe: "The only question, therefore, is, whether the acts of 1797 and 1812 have this effect. It is undeniable that no acts of a similar character were in existence in Virginia at the time when the compact was made; and, therefore, no aid can be derived from the actual legislation of Virginia to support them." These acts were held to abridge the rights of the holder under the Virginia title, and, whether remedial or otherwise, were consequently repugnant to the compact. By the compact, the rights and interests of the Virginia claimant, both as to their nature and extent, say the court, were to be exclusively determined by the laws of Virginia. In other words, where rights are to be determined by one law, another and a repugnant law can have no influence upon them. And this was the point

adjudged in the case of Green *v.* Biddle. The question did not arise under the Constitution of the United States, but under the compact.

In the case of Sturges *v.* Crowninshield, 4 Wheat. 200, the late chief justice says: "The distinction between the obligation of a contract and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct." This is the true principle laid down in explicit terms.

The doctrine that the remedy constitutes a part of the contract is a mere abstraction, which cannot be carried into practical operation. If the doctrine be sound, it secures the means for the enforcement of the contract at its date.

Now does any one doubt that a state legislature may abolish imprisonment for debt, as well on past as future contracts? Here is a modification of the remedy, which takes away a means, and often a principal means, of enforcing the payment of the debt. And yet this is admitted by all to be a constitutional law. Nor does any one doubt the constitutionality of a statute of limitations. This operates upon contracts entered into before its enactment, and bars the right of action.

Now, if the remedy existing at the time of the contract is a part of the contract, the state legislature cannot modify the remedy, much less, as by the above statute, take it away. It is no answer to this argument to say, that the statutory bar is only interposed where the obligee has been grossly negligent. There was no such condition of vigilance at the date of the contract, and if the above argument be sound, no subsequent action of the legislature can impair its obligation by materially retarding its enforcement, much less by barring the remedy.

The argument in favour of the statute is, that it does not act upon the contract, but withdraws the remedy. Now if this be a constitutional exercise of power by a state legislature, surely the exercise of the lesser power, by modifying the remedy at discretion, must also be constitutional. Does not the greater power include the lesser? The power, whether exercised in passing a statute of limitations, or in modifying the laws in relation to

judgments and executions, acts upon the remedy. In both instances the enactments constitute the laws of the forum. And in my judgment, they depend upon the same power over the remedy.

But if the remedy be a part of the contract, how must it be applied? Instead of looking to the laws regulating judicial proceedings at the time the action is brought, the court must look to the date of the contract and the laws then in force. The contract, in this view, gives vitality to laws annulled by the legislature, and the law of the remedy becomes as diversified as the contracts to which it is applied. Can such a rule of construction be enforced?

How is a contract made in one state to be enforced in another? If the remedy in the state where the contract is made enter into it, does it carry this remedy into another jurisdiction? This will not be contended; and why not? If the contract within the state include the law of the remedy, why does it not carry into a foreign jurisdiction the same conditions? Every contract does this, which is governed by the local law. A contract for the payment of money, made and to be performed in the state of New York, bears 7 per cent. interest. And this rate of interest is recovered on the contract, in a state where 7 per cent. would be usurious. And so of every other contract made under a local law, however repugnant may be its conditions to the laws and policy of the jurisdiction where the remedy is sought. This is emphatically the law of the contract. And if the remedy be also the law of the contract, it must follow the contract wherever it shall be prosecuted. If this be not the case, the argument falls; the remedy exists independently of the contract, and does not constitute a part of it.

A contract void by the local law on the ground of usury, or because it is against the policy of the law, can be enforced nowhere. There is no exception to the principle that where a contract is entered into under the sanctions of a state law, that law governs the contract in whatever jurisdiction suit may be brought on it. And so where a contract is made in one state to be performed in another, the place of performance gives the law of the contract. But in no case does the remedy attach itself to the contract, so as to constitute a part of it. Such an idea is too abstract for practical operations. At most, it could only affect contracts sued on in the state where they were made. Such a principle

could not be carried out. It would diversify the remedy to an impracticable extent.

Every contract is entered into with a supposed knowledge by the parties, that the law-making power may modify the remedy. And this it may do, at its discretion, so far as it acts only on the remedy. It may regulate the mode in which process shall be issued and served; how the pleadings shall be filed, and at what term judgment shall or may be entered. And it may also regulate final process. It may require that the personal property of the defendant shall be levied on and sold, before land shall be taken in execution. It may say what notice shall be given on the sale of real estate on execution; and also require that it shall sell for one-half or two-thirds of its value. A valuation law in those states where it has been adopted has been found salutary in guarding the rights of debtor and creditor. A debtor, under this law, cannot defeat the claim of his creditor, by purchasing the real estate levied on, through the agency of a friend, at a nominal price; and this protects the rights of the creditors of the defendant generally. There may be some cases of hardship to creditors under such a law, but they must be few and unimportant in comparison with the benefits secured by the law both to creditors and debtors. Some restriction on the sale of land on execution is required by a sound policy, especially in new and rising states, where real property can scarcely be said to have a final value.

But this law is supposed to be unconstitutional from its retrospective effect. I had supposed that such a supposition could not be raised, under the decision of this court.

In the case of Satterlee *v.* Matthewson, 2 Peters, 407, "the plaintiff, at the trial, set up a title under a warrant dated the 10th January, 1812, founded upon an improvement in the year 1785, which it was admitted was under a Connecticut title, and a patent dated 19th February, 1813.

"The defendant claimed title under a patent issued to John Wharton in the year 1781, and a conveyance by him to Satterlee in 1812." Some time in the year 1790, the defendant had come into possession as tenant to the plaintiff, and it was insisted that the defendant was estopped from setting up his title. The Court of Common Pleas decided in favour of the plaintiff; but on a writ of error, the Supreme Court of Pennsylvania held, that "by the

settled law of that state, the relation of landlord and tenant could not subsist under a Connecticut title." Upon which ground the judgment was reversed, and a *venire facias de novo* was awarded.

On the 8th day of April, 1826, and before the second trial of the cause took place, the legislature of that state passed a law, declaring, "that the relation of landlord and tenant shall exist, and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants, as between other citizens of this commonwealth, on the trial of any cause now pending or hereafter to be brought within this commonwealth, any law or usage to the contrary notwithstanding." Under the instruction of the court in accordance with that statute, the jury found a verdict for the plaintiff, on which judgment was entered. This judgment, on being removed by writ of error to the Supreme Court of Pennsylvania, was affirmed. On the ground that the above statute impaired the obligation of the contract between Satterlee and Matthewson, the cause was removed to this court from the Supreme Court of Pennsylvania, by a writ of error.

In their opinion this court say, "If the effect of the statute in question be not to impair the obligation of the contract, is there any other part of the Constitution of the United States to which it is repugnant? It is said to be retrospective. Be it so; but retrospective laws which do not impair the obligation of contracts, or partake of the character of *ex post facto* laws, are not condemned or forbidden by any part of that instrument."

And again, "The objection is urged that the effect of this act was to divest rights which were vested by law in Satterlee. There is certainly no part of the Constitution of the United States which applies to a state law of this description; nor are we aware of any decision of this, or of any Circuit Court, which condemned such a la upon this ground."

Here was a direct legislation not only on existing rights grow ing out of contracts, but such an effect was given to the law a: to divest vested rights. And yet this act was held not to be in violation of the Constitution of the United States.

What vested right is there or can there be, in the nature of things, in the holder of a contract to the particular remedy for its enforcement which existed at its date? But if there were such a vested right as to the remedy, which there is not, it may, under

the above authority, be divested by law. If the decision do not mean this, it means nothing.

A state legislature cannot impair the contract by changing the time or manner of its performance. By the contract, the parties have fixed their rights and obligations; and these are guarded by the Constitution. But the remedy for the enforcement of the contract being established by the law-making power, may be modified at its discretion. This is admitted as regards subsequent contracts, but the same rule applies to prior ones. So far as the mere remedy is concerned, in my judgment, no sound and practical distinction can be drawn between prior and future contracts.

I think, in the case under consideration, that the laws of Illinois referred to do not apply, and, therefore, I agree to the answers given by the court to the points certified.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the district of Illinois, and on the points and questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this Court, 1st. That the decree should direct the premises to be sold at public auction to the highest bidder, without regard to the law of February 19th, 1841, which gives the right of redemption to the mortgagor for twelve months, and to the judgment creditor for fifteen. 2d. That the decree should direct the sale of the mortgaged premises without being first valued by three householders, and without requiring two-thirds of the amount of the said valuation to be bid according to the law of February 27th, 1841; and that the decision of these two questions disposes of the third. It is thereupon now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

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OF THE

PRINCIPAL MATTERS.

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ASSUMPSIT.

1. The action of assumpsit for the use and occupation of lands and houses, existed in Virginia anterior to the cession of the District of Columbia to the United States. *Lloyd* v. *Hough*, 153.
2. But this action is founded upon contract, either express or implied, and will not lie where the possession has been acquired and maintained under a different or adverse title, or where it was tortious and makes the holder a trespasser. *Ibid.*

BANKRUPTCY.

1. Upon questions adjourned from the District to the Circuit Court under the "Act to establish a uniform system of bankruptcy throughout the United States," the district judge cannot sit as a member of the Circuit Court, and consequently, the points adjourned cannot be brought before this Court by a certificate of division. *Nelson* v. *Carland*, 255.
2. Nor will an appeal or writ of error lie from the decision of the Circuit Court; and it is conclusive upon the district judge. *Ibid.*
3. The bankrupt act declared to be constitutional by the Circuit Court of Kentucky. *Note to Judge Catron's dissentient opinion. Ibid.*

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See COMMERCIAL LAW.

Whenever a banker has advanced money to another, he has a lien on all the paper securities which are in his hands for the amount of his general balance, unless such securities were delivered to him under a particular agreement. *Bank of the Metropolis* v. *New England Bank*, 239.

BONDS.

See SURETY.

CHANCERY.

1. If the owner of land recognises a sale of it, although made by a person who had no authority to sell, there is a privity of contract between the owner and the purchaser, which a court of equity will enforce. *Buchannon and others* v. *Upshaw*, 56.
2. But the owner is entitled to all the advantages of the sale thus recognised. *Ibid.*
3. A perpetual injunction will be decreed in such case, to prohibit the owner of the legal title from prosecuting his ejectment. *Ibid.*

CHANCERY.

4. A deed, absolute on the face of it, is yet sometimes treated as a mortgage. *Morris* v. *Nixon and others*, 118.
5. Where a bill substantially charges that there is a fraudulent attempt to hold property under a deed, absolute on the face of it, but intended as a security for money loaned, evidence will be admitted to ascertain the truth of the transaction. *Ibid.*
6. Where there is proof of parties meeting upon the footing of borrowing and lending, with an offer to secure the lender by a mortgage upon particular property; if a deed of the property, absolute on the face of it, be given to the lender, and the lender also take a bond from the borrower, equity will interpret the deed to be a security for money loaned, unless the lender shall show, by proofs, that the borrower and himself subsequently bargained upon another footing than a loan. *Ibid.*
7. Where a loan is an inducement for the execution of a deed which is absolute on the face of it, though the loan is not recited as the consideration of the deed, or as any part of it, if the lender or grantee in the deed treats it subsequently as the consideration or a part of it, equity will declare the deed to be a security for money loaned. *Ibid.*
8. The answer of one defendant in equity is not evidence in behalf of another defendant. *Ibid.*
9. If, in equity, it is admitted or proved that one of the documents in a transaction was not intended to be what it purports, it subjects other documents in the same transaction to suspicion. *Ibid.*
10. A fact tried and decided by a court of competent jurisdiction, cannot be contested again between the same parties; and there is no difference in this respect between a verdict and judgment at common law and a decree of a court of equity. *Bank of the United States and others* v. *Beverly and others*, 134.
11. But an answer in chancery setting up, as a defence, the dismission of a former bill filed by the same complainants, is not sufficient unless the record be exhibited. *Ibid.*
12. A disposition by a testator of his personal property to purposes other than the payment of his debts, with the assent of creditors, is in itself a charge on the real estate, subjecting it to the payment of the debts of the estate, although no such charge is created by the words of the will. *Ibid.*
13. Lapse of time is no defence where there is an unexecuted trust to pay debts which have been declared by a court to be unpaid in point of fact. *Ibid.*
14. There must be conscience, good faith, and reasonable diligence, to call into action the powers of a court of equity. *M'Knight* v. *Taylor*, 161.
15. In matters of account, where they are not barred by the act of limitations, courts of equity refuse to interfere, after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice, when the original transactions have become obscured by time, and the evidence may be lost. *Ibid.*
16. A court of equity, which never is active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights for a great length of time.

CHANCERY.

Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. When these are wanting, the court is passive and does nothing; laches and neglect are always discountenanced; and therefore, from the beginning of this jurisdiction, there was always a limitation of suit in this court. *Bowman and others* v. *Wathen and others*, 189.

17. Every new right of action, in equity, that accrues to a party, whatever it may be, must be acted upon, at the utmost, within twenty years. *Ibid.*

18. And though the claimant may have been embarrassed by the frauds of others, or distressed, it is not sufficient to take the case out of the rule. *Ibid.*

19. Where the complainants have long slept upon their rights, this court must remain passive and can do nothing; and this is equally true, whether they knew of an adverse possession, or, through negligence and a failure to look after their interests, permitted the title of another to grow into full maturity. *Ibid.*

20. Where a decree is passed by the court below against an executor, being the defendant in a chancery suit, and before an appeal is prayed the executor is removed by a court of competent jurisdiction, and an administrator *de bonis non* with the will annexed, is appointed, all further proceedings, either by execution or appeal, are irregular, until the administrator be made a party to the suit. *Taylor et al.* v. *Savage*, 282.

21. If an execution be issued before the proper parties are thus made, it is unauthorized and void, and no right of property will pass by a sale under it. *Ibid.*

22. The administrator cannot obtain redress by application to this court, but must first be made a party in the court below. This may be done at the instance of either side. *Ibid.*

23. After he is thus made a party, he may stay proceedings by giving bond, or the complainants may enforce the decree, if the bond be not given in time. *Ibid.*

24. It is not clear that a complainant, who has appealed from a decree in his favour in the hope of obtaining a larger sum, can, pending the appeal, issue execution upon the decree of the court below. *Ibid.*

COMMERCIAL LAW.

1. A letter of guarantee, written in the United States, and addressed to a house in England, must be construed according to the laws of that country. *Bell and Grant* v. *Bruen*, 169.

2. Extrinsic evidence may be used to ascertain the true import of such an agreement, and its construction is matter of law for the court. *Ibid.*

3. In bonds, with conditions for the performance of duties, preceded by recitals, the undertaking, although general in its terms, is limited by the recital. *Ibid.*

4. But commercial letters are not to be construed upon the same principles as bonds, but ought to receive a fair and reasonable interpretation according to the true import of the terms, to what is fairly to be presumed to have been the understanding of the parties; and the presumption is to be ascertained from the facts and circumstances accompanying the entire transaction. *Ibid.*

COMMERCIAL LAW.

5. Where there have been, for several years, mutual and extensive dealings between two banks, and an account current kept between them, in which they mutually credited each other with the proceeds of all paper remitted for collection, when received, and charged all costs of protests, postage, &c.; accounts regularly transmitted from the one to the other, and settled upon these principles; and upon the face of the paper transmitted, it always appeared to be the property of the respective banks, and to be remitted by each of them upon its own account, there is a lien for a general balance of account upon the paper thus transmitted, no matter who may be its real owner. *Bank of the Metropolis* v. *the New England Bank*, 234.

CONSTITUTIONAL LAW.

1. A person in custody under a *capias ad satisfaciendum*, issued under the authority of the Circuit Court of the United States, cannot legally be discharged from imprisonment by a state officer, acting under a state insolvent law. *Duncan* v. *Darst et al.* 301.
2. A state law, passed subsequently to the execution of a mortgage, which declares that the equitable estate of the mortgagor shall not be extinguished for twelve months after a sale under a decree in chancery, and which prevents any sale, unless two-thirds of the amount at which the property has been valued by appraisers shall be bid therefor, is within the clause of the tenth section of the first article of the Constitution of the United States, which prohibits a state from passing a law impairing the obligation of contracts. *Bronson* v. *Kinzie et al.* 311.

DECLARATIONS OF PARTIES.

See MARRIAGE.

DEED.

See CHANCERY.

EJECTMENT.

1. In an action of ejectment, if the plaintiff count upon a lease to himself from a person whom the evidence shows to have been dead at the time, it is bad. *Connor* v. *Bradley and Wife*, 211.
2. It is a settled rule at common law, that where a right of re-entry is claimed on the ground of forfeiture for nonpayment of rent, there must be proof of a demand of the precise sum due at a convenient time before sun-set on the day when the rent is due upon the land, in the most notorious place of it, even though there be no person on the land to pay. *Ibid.*
3. In proceeding under the statute of 4 Geo. 2, it must be alleged and proved that there was no sufficient distress upon the premises on some day or period between the time at which the rent fell due, and the day of the demise; and if the time when, according to the proofs, there was not a sufficient distress upon the premises, be subsequent to the day of the demise, it is bad. *Ibid.*

EVIDENCE.

1. The declarations of a deceased member of a family that the parents of it never were married, are admissible in evidence, whether his connection with that family was by blood or marriage. *Jewell's Lessee* v. *Jewell*, 219.

EVIDENCE.

2. The acts and declarations of the parties being given in evidence on both sides, on the question of marriage, an advertisement announcing their separation, and appearing in the principal commercial newspaper of the place of their residence immediately after their separation, is part of the *res gesta*, and admissible in evidence. Whether or not it was inserted by the party, and if it was, what were his motives, are questions of fact for the jury. *Ibid.*

3. If a written contract between the parties be offered in evidence, the purport of which is to show that the parties lived together on another basis than marriage, and the opposite party either denies the authenticity of the paper, or alleges that it was obtained by fraud; the question whether there was a marriage or not is still open to the jury upon the whole of the evidence. *Ibid.*

4. It is legal evidence that the President specially authorized and directed, in writing, the secretary of the Treasury to make advances of public money, and that such paper was destroyed when the Treasury building was burned. It is sufficient, if the witness states his belief that it was so destroyed. *Williams* v. *United States*, 290.

5. The dockets and records of a court, showing that money had been received by the marshal or his deputies, under executions, are evidence in a suit against his securities. *Ibid.*

EXECUTORS AND ADMINISTRATORS.

See CHANCERY.

1. If an executor, in distributing an estate, assigns to one of the distributees a mortgage which is for a greater amount than his share, the distributee is not bound to make up the difference in case the mortgaged property sells for less than the amount of the mortgage. *Hammond's Adm.* v. *Lewis, Ex. of Washington*, 14.

2. A disposition by a testator of his personal property to purposes other than the payment of his debts, with the assent of creditors, is in itself a charge on the real estate, subjecting it to the payment of the debts of the estate, although no such charge is created by the words of the will. *Bank of the United States and others* v. *Beverly*, 134.

FLORIDA.

See LANDS, PUBLIC.

GUARANTEE.

See COMMERCIAL LAW.

HEARSAY EVIDENCE.

See MARRIAGE.

IMPRISONMENT FOR DEBT.

A person in custody under a *capias ad satisfaciendum* issued under the authority of the Circuit Court of the United States, cannot legally be discharged from imprisonment by the state officer acting under a state insolvent law. *Duncan* v. *Darst et al.* 301.

INTEREST.

In the settlement of an account between the owner of land and the holder, interest begins to run against the latter from the time when the owner asserted his title to the land. *Buchannon and others* v. *Upshaw*, 56.

JURY.

1. In case of a collision of vessels, the question, by whose fault the accident happened, is a question of fact for the jury to decide upon the whole of the evidence. *Smith and others* v. *Condry*, 28.
2. Extrinsic evidence may be used to ascertain the true import of an agreement of guarantee, and its construction is matter of law for the court. *Bell and Grant* v. *Bruen*, 169.
3. An advertisement, announcing the separation of persons who had been living together as man and wife, being allowed to be given in evidence under the circumstances of the case, the questions whether or not it was inserted by the party, and if so, what were his motives, are questions of fact for the jury. *Jewell's Lessee* v. *Jewell*, 219.
4. If a written contract between the parties be offered in evidence, the purport of which is to show that the parties lived together on another basis than marriage, and the opposite party either denies the authenticity of the paper, or alleges that it was obtained by fraud, the question whether there was a marriage or not is still open to the jury upon the whole of the evidence. *Ibid.*

LANDS, PUBLIC.

1. The certificate of the secretary of the Spanish governor of Florida is *prima facie* evidence of the existence of a grant of land. *United States* v. *Acosta*, 24.
2. The Spanish governor had authority to issue such a grant. *Ibid.*
3. In the case of a grant made before the 24th of January, 1818, it is valid, although the survey was not made until after that day, provided the survey was made before the exchange of flags. *Ibid.*
4. It is not a good objection to such a grant that the metes and bounds were not set forth. *Ibid.*
5. A grant of land, "bounded east by the river Mobile," covers the ground between high water and low water marks. *City of Mobile* v. *Emanuel*, 95.

LIEN.

See BANKS.

LIMITATION OF ACTIONS.

1. The statute of limitations of Virginia, passed in 1785, barred the righ of entry, unless suit was brought within twenty years next after the cause of action accrued. The savings are infancy, coverture, &c., and such persons are barred if they do not bring their action within ten years next after their disabilities shall be removed. *Mercer's lessee* v. *Seldon*, 37.
2. Disabilities which bring a person within the exceptions of the statute, cannot be piled one upon another; but a party, claiming the benefit of the proviso, can only avail himself of the disability existing when the right of action first accrued. *Ibid.*
3. What constitutes an adverse possession. *Ibid.*
4. The legal right of an owner of land, although he has recognised a sale of it, is not destroyed by lapse of time, or his right to bring an ejectment barred, provided he has, in the mean time, brought suit upon the securities which he took when he recognised the sale. *Buchannon and others* v. *Upshaw*, 56.
5. Lapse of time is no defence where there is an unexecuted trust to pay

LIMITATION OF ACTIONS.

debts, which a court of competent jurisdiction has decided to be unpaid in point of fact. *Bank of the United States* v. *Beverly*, 134.

6. There must be conscience, good faith, and reasonable diligence, to call into action the powers of a court of equity. *McKnight* v. *Taylor*, 161.

7. In matters of account, where they are not barred by the act of limitations, courts of equity refuse to interfere after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice, when the original transactions have become obscured by time, and the evidence may be lost. *Ibid.*

8. A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands where the party has slept upon his rights for a great length of time. *Bowman and others* v. *Wathen and others*, 189.

9. Therefore, from the beginning of this jurisdiction, there was always a limitation of suit in this court. *Ibid.*

10. Every new right of action, in equity, that accrues to a party, whatever it may be, must be acted upon, at the utmost, within twenty years. *Ibid.*

11. Though the claimant may have been embarrassed by the frauds of others, or distressed, it is not sufficient to take the case out of the rule. *Ibid.*

12. And it is the same whether the party knew of an adverse possession, or, through negligence and a failure to look after their interests, permitted the title of another to grow into full maturity. *Ibid.*

LOCAL LAW.

1. Where a collision of vessels occurs in an English port, the rights of the parties depend upon the provisions of the British statutes then in force; and if doubts exist as to their true construction, this court will adopt that which is sanctioned by their own courts. *Smith and others* v. *Condry*, 28.

See LIMITATION OF ACTIONS.

2. A letter of guarantee written in the United States, and addressed to a house in England, must be construed according to the laws of the country. *Bell and Grant* v. *Bruen*, 169.

3. The law of the state of Alabama, which authorizes securities to require of the creditor forthwith to put the bond in suit against the principal, and absolves the security, unless the creditor commences suit against the principal, does not include a case where the parties (principal and security) unite in a joint and several sealed bill. *Elkis and others* v. *Jones, Admr. of Taylor*, 197.

MARRIAGE.

1. The declarations of a deceased member of a family that the parents of it never were married, are admissible in evidence whether his connection with that family was by blood or marriage. *Jewell's lessee* v. *Jewell*, 219.

2. The acts and declarations of the parties being given in evidence on both sides on the question of marriage, an advertisement announcing their separation, and appearing in the principal commercial paper of the place of their residence, immediately after their separation, is part of

MARRIAGE.

the *res gesta*, and admissible in evidence. Whether or not it was inserted by the party, and if it was, what were his motives, are questions of fact for the jury. *Ibid.*

3. If a written contract between the parties be offered in evidence, the purport of which is to show that the parties lived together on another basis than marriage, and the opposite party either denies the authenticity of the paper, or alleges that it was obtained by fraud, the question, whether there was a marriage or not, is still open to the jury upon the whole of the evidence. *Ibid.*
4. The court, being equally divided, were unable to express an opinion upon the following questions, viz. 1. Whether, "if, before any sexual connection between the parties, they, in the presence of her family and friends, agreed to marry, and did afterwards live together as man and wife," it was a legal marriage, and the tie indissoluble even by mutual consent; and, 2. Whether, "if the contract be made *per verba de presenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation," it amounts to a valid marriage, which the parties (being competent as to age and consent) cannot dissolve, and is equally as binding as if made in *facie ecclesiæ*. *Ibid.*

MARYLAND.

A bequest of freedom to a slave, under the laws of Maryland, stands on the same principles with a bequest over to a third person. Such a bequest is a specific legacy. *Williams* v. *Ash*, 1.

MORTGAGE.

1. Where a mortgage is assigned by an executor to a distributee of an estate, and the property sells for less than the nominal amount, the distributee is not responsible for the difference, in case he has acted with good faith and diligence. *Hammond's Ad.* v. *Lewis, Ex. of Washington*, 14.
2. A state law, passed subsequently to the execution of a mortgage, which declares that the equitable estate of the mortgagor shall not be extinguished for twelve months after a sale under a decree in chancery, and which prevents any sale unless two-thirds of the amount at which the property has been valued by appraisers shall be bid therefor, is within the clause of the tenth section of the first article of the Constitution of the United States, which prohibits a state from passing a law impairing the obligation of contracts. *Bronson* v. *Kinzie et al.* 311.

NEGROES AND SLAVES.

A slave is capable of receiving a bequest of freedom upon the happening of a contingency which is not too remote. Such a bequest is a specific legacy. *Williams* v. *Ash*, 1.

PATENT RIGHTS.

1. If a person employed in the manufactory of another, whilst receiving wages, makes experiments at the expense and in the manufactory of his employer; has his wages increased in consequence of the useful result of the experiments; makes the article invented, and permits his employer to use it, no compensation for its use being paid or demanded; and then obtains a patent: these facts will justify a presumption of a license to use the invention. *M'Clurg and others* v. *Kingsland and others*, 202.

PATENT RIGHTS.

2. Such an unmolested and notorious use of the invention prior to the application for a patent, will bring the case within the provisions of the 7th section of the act of 1839, c. 88. *Ibid.*
3. The assignees of a patent right take it subject to the legal consequences of the previous acts of the patentee.
4. The 14th and 15th sections of the act of 1836, c. 357, prescribe the rules which must govern on the trial of actions for the violations of patent rights; and these sections are operative, so far as they are applicable, notwithstanding the patent may have been granted before the passage of the act of 1836. *Ibid.*
5. The words "any newly invented machine, manufacture, or composition of matter," in the 7th section of the act of 1839, have the same meaning as "invention," or "thing patented." *Ibid.*

PLEADING.

1. A plaintiff may, in an action in form *ex delicto* against several defendants, enter a *nolle prosequi* against one of them. But in actions in form *ex contractu*, unless the defence be merely in the personal discharge of one of the defendants, a *nolle prosequi* cannot be entered as to one defendant without discharging the other. *United States* v. *Linn*, 104.
2. A plea, alleging merely that seals were affixed to a bond without the consent of the defendant, without also alleging that it was done with the knowledge, or by the authority or direction of the plaintiffs, is not sufficient. *Ibid.*
3. A plea which has on the face of it two intendments, ought to be construed most strongly against the party who pleads it. *Ibid.*
4. A party who claims under an instrument which appears on its face to have been altered, is bound to explain the alteration; but not so when the alteration is averred by the opposite party, and it does not appear upon the face of the instrument. *Ibid.*
5. Where the plea is bad, and the demurrer is to the plea, the court, having the whole record before them, will go back to the first error. *Ibid.*
6. Where the date of a surety bond is subsequent to the appointment of the principal to office, the declaration should allege that the money collected by the principal remained in his hands at the time when the surety bond was executed. *Ibid.*
7. The action of *assumpsit* for the use and occupation of lands and houses existed in Virginia anterior to the cession of the District of Columbia to the United States. *Lloyd* v. *Hough*, 153.
8. But this action is founded upon contract, either express or implied, and will not lie where the possession has been acquired and maintained under a different or adverse title, or where it was tortious, and makes the holder a trespasser. *Ibid.*
9. The court will not express an opinion upon a matter of defence which was not brought to the consideration of the court below. *Bell and Grant* v. *Bruen*, 169.
0. The law of the state of Alabama which authorizes securities to require of the creditor forthwith to put the bond in suit against the principal, and absolves the security unless the creditor commences suit and uses due diligence to collect the debt from the principal, does not include

PLEADING.

a case where the parties (principal and security) unite in a joint and several sealed bill. *Ellis and others* v. *Jones, Admr. of Taylor*, 197.

11. In an action of ejectment, if the plaintiff count upon a lease to himself from a person whom the evidence shows to have been dead at the time, it is bad. *Connor* v. *Bradley and wife*, 211.
12. It is a settled rule at common law, that where a right of re-entry is claimed on the ground of forfeiture for nonpayment of rent, there must be proof of a demand of the precise sum due, at a convenient time before sunset, on the day when the rent is due, upon the land, in the most notorious place of it, even though there be no person on the land to pay. *Ibid.*
13. In proceeding under the statute of 4 Geo. 2, it must be alleged and proved that there was no sufficient distress upon the premises on some day or period between the time at which the rent fell due and the day of the demise; and if the time when, according to the proofs, there was not a sufficient distress upon the premises, be subsequent to the day of the demise, it is bad. *Ibid.*
14. After pleading the general issue, it is too late to take advantage of a defect in the writ, or a variance between the writ and declaration. *McKenna* v. *Fisk*, 241.
15. Actions of trespass, except those for injury to real property, are transitory in their character. *Ibid.*
16. Where the writ mentions a trespass with force and arms upon the store-house of the plaintiff, and a seizure and destruction of goods, it covers a transitory as well as a local action. *Ibid.*
17. In transitory actions, a venue is laid to show where the trial is to take place. It is a legal fiction, devised for the furtherance of justice, and cannot be traversed. *Ibid.*
18. In such actions, such a venue is good without stating where the trespass was in fact committed, with a scilicet of the county where the action is brought. *Ibid.*
19. In the absence of statutory provisions, the courts in the District of Columbia must apply the principles of the common law to such actions, the pleadings, and the proofs. *Ibid.*

PRACTICE.

See CHANCERY AND PLEADING.

1. Whether or not a record contains a bill of exceptions or statement of facts by the court, according to the practice in Louisiana, by which any question of law is brought up for revision in such a form as to enable this court to decide upon it; and whether or not there is a mass of various and conflicting testimony in relation to facts, upon which no jurisdiction can be exercised upon a writ of error; are questions to be decided only upon the final hearing of the cause. *Minor and Wife* v. *Tillotson*, 287.
2. The court will not go into this inquiry upon a motion to dismiss the writ of error, before the case is taken up for argument. *Ibid.*
3. The dockets and records of a court, showing that money had been received by the marshal or his deputies under executions, are good evidence in a suit against his securities. *Williams* v. *United States*, 290.

PRESIDENT OF THE UNITED STATES.

1. The act of Congress passed January 31, 1823, prohibiting the advance

PRESIDENT OF THE UNITED STATES.

of public money in any case whatsoever to the disbursing officers of government, except under the special direction of the President, does not require the personal and ministerial performance of this duty, to be exercised in every instance by the President under his own hand. *Williams* v. *The United States*, 290.

2. Such a practice, if it were possible, would absorb the duties of the various departments of the government in the personal action of the one chief executive officer, and be fraught with mischief to the public service. *Ibid.*

3. The President's duty, in general, requires his superintendence of the administration, yet he cannot be required to become the administrative officer of every department and bureau, or to perform, in person, the numerous details incident to services which, nevertheless, he is, in a correct sense, by the Constitution and laws required and expected to perform. *Ibid.*

4. It is legal evidence that the President specially authorized and directed, in writing, the secretary of the Treasury to make such advances, and that such paper was destroyed when the Treasury building was burned. It is sufficient if the witness state his belief that it was so destroyed. *Ibid.*

PRIVITY OF CONTRACT.

If the owner of land recognise a sale of it made by a person who had no authority to sell, there is a privity of contract between the owner and the purchaser, which equity will enforce. *Buchannon and others* v. *Upshaw*, 56.

SLAVES.

See NEGROES.

SURETY.

See COMMERCIAL LAW.

1. The law of the state of Alabama, passed in 1821, chap. 26, sec. 5, which authorizes securities to require of the creditor forthwith to put the bond in suit against the principal, and absolves the security unless the creditor commences suit, and uses due diligence to collect the debt from the principal, does not include a case where the parties (principal and security) unite in a joint and several sealed bill. *Ellis and others* v. *Jones, Admr. of Taylor*, 197.

2. Where a collector is continued in office for more than one term, but gives different sureties, the liability of the sureties is to be estimated just as if a new person had been appointed to fill the second term. *The United States* v. *Irving et al.* 250.

3. When the accounts of a collector are returned to the Treasury quarterly, and the date of the commencement and expiration of his term of office is on some intermediate day between the beginning and end of the quarter, a restatement and Treasury transcript of his account up to the end of his term, is legal evidence in a suit against the sureties. *Ibid.*

4. Such a restatement does not falsify the general accounts, but arranges the items of debits and credits so as to exhibit the transactions of the collector during the four years for which the sureties were responsible. *Ibid.*

5. The amount charged to the collector at the commencement of his second term is only *primâ facie* evidence against the sureties. *Ibid.*

SURETY.

6. But payments into the Treasury of moneys accruing and received in the second term should not be applied to the extinguishment of a balance apparently due at the end of the first term. Payments made in the subsequent term of moneys received on duty bonds or otherwise, which remained charged to the collector as of the preceding official term, should be so applied. *Ibid.*
7. The settlement of quarterly accounts at the Treasury, running on in a continued series, is not conclusive. The officers of the Treasury cannot, by any exercise of their discretion, enlarge or restrict the obligation of the collector's bond. Much less can they, by the mere fact of keeping an account current, in which debits and credits are entered as they occur, and without any express appropriation of payments, affect the rights of sureties. *Ibid.*
8. The dockets and records of a court, showing that money had been received by the marshal or his deputies, under executions, are good evidence in a suit against his securities. *Williams* v. *The United States*, 290.

TENANCY BY THE COURTESY.

The general rule of law is, that there must be an entry during coverture, to enable the husband to claim a tenancy by the courtesy. *Mercer's lessee* v. *Selden*, 37.

TREASURY DEPARTMENT, and TREASURY TRANSCRIPT.

See PRESIDENT OF THE UNITED STATES, and SURETY.

TRESPASS.

See PLEADING.

VESSELS.

1. Where a collision of vessels occurs in an English port, the rights of the parties depend upon the provisions of the British statutes then in force; and if doubts exist as to their true construction, this court will adopt that which is sanctioned by their own courts. *Smith and others* v. *Condry*, 28.
2. By the English statutes, as interpreted in their courts, the master or owner of a vessel trading to or from the port of Liverpool, is not answerable for damages occasioned by the fault of the pilot. *Ibid.*
3. The actual damage sustained by the party at the time and place of injury, and not probable profits at the port of destination, ought to be the measure of value in damages, in cases of collision as well as in cases of insurance. *Ibid.*
4. By whose fault the accident happened is a question of fact for the jury, to be decided by them upon the whole of the evidence. *Ibid.*
5. If a ship be at anchor with no sails set, and in a proper place for anchoring, and another ship, under sail, occasions damage to her, the latter is liable. *Strout and others* v. *Foster*, 89.
6. But if the place of anchorage be an improper place, the owners of the vessel which is injured must abide the consequences of the misconduct of the master. *Ibid.*
7. The thoroughfare of the pass of the Mississippi river, at its mouth, is not a proper place to anchor. *Ibid.*

VIRGINIA.

See ASSUMPSIT, and LIMITATION OF ACTIONS.

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